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Case No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

SOUTHWEST SECURITY EQUIPMENT CORPORATION,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, REINFORCING AND ORNAMENTAL IRON WORKERS, LOCAL UNION NO. 75, AFL-CIO

Intervenor.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether the hiring hall provisions of a labor agreement, defining a close, intimate employer - union relationship, survive the agreement's expiration under the test promulgated by the National Labor Relations Board for such analysis.[1/]

1/ The petition for a writ of certiori by Southwest to this Court is limited solely to the question of the survivability of the hiring hall in the post-contract period.

LIST OF PARTIES TO PROCEEDING BELOW

The parties to the proceeding below are:

1. Southwest Security Equipment Corporation;

2. The National Labor Relations Board;

3. International Association of Bridge, Structural, Reinforcing and Ornamental Iron Workers, Local Union No. 75, AFL-CIO.

TABLE OF CONTENTS

	Page
Question Presented for Review . .	i
List of Parties to Proceeding Below	ii
Table of Contents	iii-iv
Table of Authorities.	v-viii
Reference to Official and Unofficial Reports.	1
Jurisdictional Statement.	2
Statutory Provisions Involved	3-7
Statement of the Case	8-15
Reason for Granting The Writ	
Introduction	.16-17
Argument	
(A) The Panel's Decison is Erroneous.	.18-20
(B) The Erroneous NLRB Decision Absent Any Analysis.	.21-25

Page

(C) Other Aspects of the Employer-Employee Relationship, Union Security and Checkoff, Do Not Survive The Agreement's Expiration. . 25-29

(D) Employer Responsibility For Hiring Hall Violations 29-31

(E) Hiring Hall Provisions of Southwest-Union Agreement. 31-36

(F) Prior Supreme Court Analysis of Hiring Hall is Supportive of Soutwest's Position. 36-40

Conclusion 41

Appendix A . . . . . .1a - 41a

Appendix B . . . . . .42a - 56a

Appendix C . . . . . .57a - 107a

Appendix D. . . . . .110a - 112a

Appendix E. . . . . .113a - 131a

TABLE OF AUTHORITIES

Cases:	Page
Caroline Farms, Division of Textron, Inc. v. NLRB, 401 F.2d 205 (4th Cir. 1968)	26
Diamond Glass Corporation v. Glass Warehouse Workers and Pane Handlers, Local Union, 682 F.2d 301 (2nd Cir. 1982).	27
Ford Motor Car v. NLRB, 441 U.S. 448,497 (1979)	22,23
General Warehousemen and Employees Union, Local No. 636 v. J.C. Penney Co., 484 F.Supp. 130 (W.D. Pa. 1980)	27
Gordon L. Rayner, d/b/a Bay Area Sealers, 251 NLRB 89 (1984)	22
Houston Chapter, Association of General Contractors, 143 NLRB 409 (1963)	.19,23,24

Cases: Page

Journeymen Pipe Fitters Local No. 392 (Kaiser Engineers, Inc.), 252 NLRB 417 (1980) . . . 31

Local Union 675, I.B.E.W. AFL-CIO (S & M Electric Co.), 223 NLRB 1499 (1976). . . 31

Machinists Local 1327, International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge 115 v. NLRB, 725 F.2d 1212 (9th Cir. 1984) . . . 39

Milwaukee Typographic Union v. Madison Newspapers, 444 F.Supp. 1223 (W.D. Wis. 1978) 27

NLRB v. Andrew Jergens Co., 175 F.2d 130 (9th Cir. 1949) cert. den. 338 U.S. 827 (1949). 26

NLRB v. Boss Manufacturing Co., 118 F.2d 187 (7th Cir. 1941). 26

NLRB and International Association of Bridge,

Cases: *Page*

Structural and Reinforcing Ornamental Iron Workers, AFL-CIO v. Southwest Security Equipment Corporation, Case No. 83-7286, p.13. 18,23

NLRB v. Tom Joyce Floors, Inc., 353 F.2d 768 (9th Cir. 1965). 24,

NLRB v. Tomco Communications, Inc., 567 F.2d 871 (9th Cir. 1978). 26,

NLRB v. Wooster Division of Borg-Warner Co., 356 U.S. 342, 350 (1958) 24,

Nolde Brothers, Inc. v. Bakery Workers Local 353, 430 U.S. 243 (1977) 27,40

Q.V.L. Construction, Inc., 260 NLRB No. 139 (1982) 29

S. Freedman Electric, Inc., 256 NLRB 432 (1981) 26

Sir James, Inc., 183 NLRB 257 (1970). 20,22

Southwest Security Equipment Corporation, 262 NLRB No. 79. 12

Statutes:

28 U.S.C. §1254(1). 2

29 U.S.C. §158(a)(1). 3,8,9

29 U.S.C. §158(a)(3). 8

29 U.S.C. §158(a)(5). 8,9,16

29 U.S.C. §158(d) 3

29 U.S.C. §160(e) 2,14,15,21

Other Authorities:

Gorman, Basic Text on Labor Law at p. 641-643 28,29

The Developing Labor Law (Volume II, 2nd Edition, B.N.A. 1983) at p. 1405 31

REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS

Ninth Circuit Court of Appeals Memorandum Decision - F.2d - (9th Cir. 1984) (Published) . . . . . 1a - 41a

National Labor Relations Board Decision and Order 262 NLRB No. 79 (Published) . . . . . 42a - 56a

Decision of the Administrative Law Judge (Published) . . . . . .57a - 109a

Ninth Circuit Court of Appeals Order (Unpublished) on Petition for Rehearing/Suggestion for Rehearing en Banc . . . 110a - 112a

Excerpt of Arizona Master Labor Agreement by and between Southwest Security Equipment Corporation and the International Association of Bridge, Structural, Reinforcing Ornamental Ironworkers Local No. 75 (Section 3) . . . . . 113a - 131a

JURISDICTION

The United States Court of Appeals for the Ninth Circuit filed and entered its Judgment in this matter on July 3, 1984, enforcing an order of the National Labor Relations Board. Southwest Security Equipment Corporation Petition for Rehearing/Suggestion for Rehearing En Banc was denied on October 12, 1984 by Court Order and this petition for certiorari was filed within 90 days thereafter.

Pursuant to Section 10(e) of the National Labor Relations Act as amended (29 U.S.C. §160(e) and 28 U.S.C. §1254(1)), this Court has jurisdiction to review the Judgment and Order upon writ of certiorari.

Statutory Provisions Involved

29 U.S.C. § 158 Unfair labor practices

§158(a) It shall be an unfair labor practice for an employer

> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

* * *

§158(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement

reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: Provided, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification -

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a

contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2)-(4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual,

which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158

to 160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

STATEMENT OF THE CASE

On or about July 24, 1980, the International Association of Bridge, Structural, Reinforcing and Ornamental Ironworkers Local Union No. 75, AFL-CIO (hereinafter "the Union") filed an unfair labor practice charge with the Regional Office of the National Labor Relations Board (hereinafter "the Board" or "NLRB") alleging a violation of §8(a)(1), (3), and (5) of the Act (29 U.S.C. §158(a)(1), (3), (5) by Southwest Security Equipment Corporation (hereinafter "Southwest"). (App.58a)[2/]

[2/] References to the Appendix will be designated "App." followed by the appropriate page ("P.") number or numbers.

On August 29, 1980, the Regional Office of the National Labor Relations Board issued a complaint against Southwest alleging a violation of §8(a)(1) and (5) of the Act (29 U.S.C. §158(a)(1), and (5). The alleged violations of the Act were in the nature of unilateral changes in employment conditions both during the term of the contract and thereafter. (R.3)[3/] Southwest timely answered the complaint denying the allegations of illegal conduct. (R.3) On

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3/ References to the Agency Record were made as follows: "R" followed by the item number within that Record. If there are numerous pages in a single document and the reference is to only one particular page, the page number will follow the time number will follow the item number, e.g. "R.1, P.1"

April 14, 1981, the case was heard before an Administrative Law Judge of the National Labor Relations Board, Earldean Robbins. On July 29, 1981, she issued her findings of fact, conclusions of law and recommended Order. She concluded that Southwest had violated the Act by inter alia failing to abide by the hiring hall or referral provisions of the labor agreement in the postcontract period. She recommended to the Board that Southwest be ordered to cease and desist from refusing to abide by the terms of the now-expired labor agreement and take certain other affirmative action. (App.58a)

On or about August 20, 1981, the employer filed Exceptions to the Decision of the Administrative Law Judge. (R.8)

The Exceptions, particularly Exceptions 5 and 6 objected to the conclusions and the recommended Order addressed to inter alia the survivability of hiring hall or referral provisions in the labor agreement in the postcontract period. On August 26, 1981, the union filed Exceptions to the Administrative Law Judge's Decision. (R.9) In reply, Southwest filed an "Answering Brief to Charging Party's Limited Exceptions to Decision of Administrative Law Judge". (R.10) This brief clearly argued that the hiring hall provisions of the agreement did not survive its expiration. (R.10) This Brief was filed on or about September 4, 1981. The Union moved, on September 11, 1981, to strike portions of Southwest's Answering Brief

on the ground that such portions were inconsistent with applicable NLRB Rules and Regulations. (R.11) On or about September 22, 1981, Southwest filed an Opposition to the Union's Motion to Strike Portions of Answering Brief and refuted any claim that the Answering Brief of Southwest was in any way inconsistent with NLRB Rules and Regulations. (R.12)

On June 30, 1982, the Board adopted the Decision of the Administrative Law Judge pro forma. (*See Southwest Security Equipment Corporation*, 262 NLRB No. 79). In a footnote, the Board granted the Union's motion to strike that portion of Southwest's Answering Brief relating to the hiring hall and its lack of

survivability in the postcontract period. Also, the Board indicated, wrongly, in the same footnote that Southwest did not timely file an Exception to the Administrative Law Judge's Decision concerning the hiring hall issue. Accordingly, the Board refused to consider the substantive issue of hiring hall survivability in the post-contract period.

On July 8, 1982, Southwest moved the Board for reconsideration of the entire Decision, but particularly the decision to pro forma adopt the Administrative Law Judge's findings, conclusions and recommended Order relative to the alleged survivability of the hiring hall or referral provisions of the now-expired labor agreement.

The employer noted its Exceptions 5 and 6 which embodied protests to the resolution of the hiring hall issue by the Administrative Law Judge. Supportive Board case law was also set forth in the Motion for Reconsideration. (R.14)

On November 12, 1982, the Board tersely denied the Motion for Reconsideration, with no explanation. (R.16)

On April 27, 1983, the Board applied for enforcement of its final Order to the court of Appeals for the Ninth Circuit pursuant to 29 U.S.C. §160(e). On May 5, 1983, Southwest answered the Board's application for enforcement. A panel of the Ninth Circuit Court of Appeals issued its Opinion on July 3, 1984 enforcing the Board's Order, though agreeing with

Southwest that its exceptions to the Administrative Law Judge's report were timely filed. (App. 2a) In this respect, the panel held that the Board arbitrarily applied 29 U.S.C. §160(e) and its rules to the facts of this case. Accordingly, the Court found that the hiring hall question had been preserved for Board and Court consideration.

On October 12, 1984, the Ninth Circuit denied the Petition for Rehearing/ Suggestion for Rehearing En Banc filed by Southwest. (App. 112a) On December 18, 1984 Southwest filed a Motion to Recall the Mandate Pending Determination of Application for Certiorari with the Ninth Circuit Court of Appeals. This motion is pending.

Reasons For Granting The Writ

Introduction

This case presents an important question of federal labor law which has not been settled by the Court, namely, whether the hiring hall provisions of a labor agreement continue to bind the employer after the agreement's expiration. Indeed, the only known, published consideration of whether it is in violation of the National Labor Relations Act, as amended (29 U.S.C. 158(a)(5)) for an employer to treat the hiring hall provisions of a labor agreement as terminated with the termination of the labor agreement is in the panel's decision on review herein and the underlying NLRB decision.

The use of the union as a hiring source is commonplace in many significant industries including construction, shipping, and hotel and restaurant. Employer's Handbook for Labor Negotiation (Fritz and Stringari) Management Labor Relations Service, 1968, at p. 197) The adverse repercussions of the erroneous decision by a panel of the Ninth Circuit of Appeals to these and other industries law will be considerable. Federal labor law will also suffer since the panel's decision enforces a Board order which explicitly did not analyze at all the far reaching implications of compelling employers to adhere to the hiring hall provisions of a labor agreement in the post-contract period.

Argument

A. The Panel's Decision is Erroneous

The panel's decision is predicated on two considerations. First, the panel's belief that the NLRB has long held that a hiring hall provision is an essential part of the employee-employer relationship. Second, the panel's determination that the hiring hall is important in the industries which use it and that "when an employer needs help, he turns to the union. The union maintains a list of people who need work, and promises to fill employer needs as they arise." (*Slip op., NLRB and International Association of Bridge, Structural and Reinforcing Ornamental Iron Workers, AFL-CIO v. Southwest Security Equipment*

Corporation, Case No. 83-7286). (App.28A) Neither reason supports the panel's decision in this regard. The first consideration is incorrect, and the second consideration is supportive of Southwest's position.

Houston Chapter, Association of General Contractors, 143 NLRB 409 (1963), enf'd. 349 F.2d 449 (5th Cir. 1975), cert. den. 382 U.S. 1026 (1966), the linchpin to the truncated NLRB analysis, is simply a case finding that the hiring hall is a mandatory subject of bargaining. No consideration whatsoever is given in *Houston Chapter*, *supra*, to the issue of whether the hiring hall provisions survive a labor agreement's expiration; accordingly, the NLRB failed to

discuss whether the hiring hall provisions of an expired labor agreement could be subsumed under the rubric of". . . matters pertaining to the relationship between an employer and a union." *Sir James, Inc.*, 183 NLRB 257 (1970).

Sir James, Inc., supra, and its progeny describe this test, crafted and fashioned by the Board, to determine which terms and conditions of employment continue into the post-contract period until either a new agreement or bargaining impasse has been reached. If the Board now wishes to abandon its own tests, it should, as an elementary matter of due process, inform its labor relation constituency of the change clearly and unequivocally.

B. The Erroneous NLRB Decision Absent Any Analysis

The Board decision bottomed its failure to carefully consider the hiring hall survivability question on the alleged failure of Southwest to properly raise the question. However, the panel found that the Board arbitrarily applied Section 10(e) [29 U.S.C. 160(e)] and its rules in failing to treat Southwest's exceptions on the hiring hall question timely filed. There is thus an irreconcilable tension and inconsistency in the panel's decision in effectively disapproving of the Board's failure to consider the exceptions covering the hiring hall question and then approving the Board's default in decision-making through the Board's pro forma adoption of

the Administrative Law Judge's decision finding that the hiring hall provisions of the labor agreement survived. The Administrative Law Judge did not even purport to apply the *Sir James, Inc., supra,* test but simply cited authority indicating that the hiring hall is a mandatory subject of bargaining.

The NLRB has effectively abdicated its statutory responsibilities by failing to apply its own analysis (Gordon L. Rayner [Bay Area Sealers] 251 NLRB 89 (1984) enf'd. as modified 665 F.2d 970 (9th Cir. 1982) Thus, the NLRB interpretation of Section 8(d) of the Act (29 U.S.C. §158(d)) is not "reasonably defensible." *Ford Motor Co. v. NLRB,* 441 U.S. 488, 497 (1979). Indeed, the Board has

not even applied its putative expertise to this problem for reasons found unsound by the panel. In the words of this Court:

> In the past we have refused enforcement of the Board orders where they had "no reasonable basis in law," either because the proper legal standard was not applied or because the Board applied the correct standard but failed to give the plain language of the standard its ordinary meaning. (citation omitted) (emphasis added) *Ford Motor Co., supra* at 497.

Indeed, the portion of the Board's decision in *Houston Chapter, supra,* excerpted by the panel (*slip op., NLRB and International Association of Bridge, Structural, Reinforcing and Ornamental Iron Workers Local Union No. 75, AFL-CIO v. Southwest Security Equipment Corporation,* Case No. 83-7286) (App. 26, 27a)

recited one of the two tests announced by the Supreme Court in *NLRB v. Wooster Division of Borg-Warner Co.*, 356 U.S. 342, 350 (1958) for determining whether a subject of bargaining is mandatory. The Ninth Circuit in *NLRB v. Tom Joyce Floors, Inc.*, 353 F.2d 768 (9th Cir. 1965) similarly found that the hiring hall is a mandatory subject of bargaining because it involved "other terms and conditions of employment within the meaning of Section 8(d)." *Tom Joyce Floors, Inc., supra*, at 771. But, neither *Houston Chapter, supra*, nor *Tom Joyce Floors, Inc., supra*, in any way speaks to the question of survivability of hiring hall provisions into the post-contract period.

That the hiring hall is important in the construction industry and the fact that the union functions as an employment service for the employer in no way impairs Southwest's position before this court. On the contrary, the intimate employer-union nexus concomitant with the hiring hall arrangement underscores the validity of the position advocated by Southwest herein.

C. Other Aspects Of The Employer-Employee Relationship Union Security and Checkoff Do Not Survive The Agreement Expiration.

It must be emphasized that union security and checkoff are also aspects of the employer-employee relationship, but these terms of employment terminate with the agreement. Both union security and checkoff are also mandatory subjects of

bargaining. *See e.g., NLRB v. Andrew Jergens Co.,* 175 F.2d 130 (9th Cir. 1949), cert. den. 338 U.S. 827 (1949); *Caroline Farms, Division of Textron, Inc. v. NLRB,* 401 F.2d 205 (4th Cir. 1968).

Likewise, arbitration is a mandatory subject of bargaining. *NLRB v. Tomco Communications, Inc.,* 567 F.2d 871 (9th Cir. 1978); *NLRB v. Boss Manufacturing Co.,* 118 F.2d 187 (7th Cir. 1941). Yet, arbitration has a life co-extensive with the life of the labor agreement. In the words of the NLRB in *S. Freedman Electric, Inc.,* 256 NLRB 432 (1981):

> "the court of appeals adds the observation that contractual terms which are solely a product of the contract itself form an exception to the general rule and that these nonsurviving terms of the contract include the arbitration

> and union security provisions in the contract. (citations omitted) In short, contract provisions governing the employer-employee, rather than employer-union, relationship survive. *Gordon L. Rayner, d/b/a Bay Area Sealers*, 251 NLRB 823 (1980)."

See too, Diamond Glass Corporation v. Glass Warehouse Workers and Pane Handlers, Local Union, 682 F.2d 301 (2nd Cir. 1982); *General Warehousemen and Employees Union, Local No. 636 v. J.C. Penney Co.*, 484 F.Supp. 130 (W.D.Pa. 1980); *Milwaukee Typographic Union v. Madison Newspapers*, 444 F.Supp. 1223 (W.D. Wis. 1978). The only exception to this principle is found in *Nolde Brothers, Inc. v. Bakery Workers Local 353*, 430 U.S. 243 (1977), where the Supreme Court found that the employer was

required to arbitrate a severance pay dispute which arose under the expired agreement, where the arbitration clause did not expressly exclude such disputes from consideration and where the expired agreement contained a clause requiring the submission of all disputes to arbitration.

Like union security and arbitration, the hiring hall is a mechanism which highlights above all else the union-employer relationship. One commentator, quoted approvingly by the panel on the hiring hall question, considers the hiring hall simply another form of union security. See Gorman, Basic Text on Labor Law, at p. 641-643. The status of the hiring hall, union security, and

arbitration as mandatory subjects of bargaining is simply the beginning of the inquiry, for "mandatory subjects include not only those that regulate the relationship between the employer and employees but also those that regulate the relationship between the employer and the union." (See R. Gorman, supra, at 506.)

D. Employer Responsibility For Hiring Hall Violations

That the hiring hall device pertains to the relationship between the employer and the union is vividly manifested in *Q.V.L. Construction, Inc.*, 260 NLRB No. 139 (1982). There, the NLRB held:

> Thus, the Board has consistently held that when an employer delegates hiring to a union by utilizing a union referral system to obtain its employees, it

> is responsible if the union operates the system in a discriminatory manner. This is so even if the employer has no actual knowledge of the union's discrimination.

The liability exposure to the employer for the union's operation of the hiring hall and the union's regulation of the flow of manpower to the employer dramatizes the fact that the union and employer are inextricably intertwined in the hiring hall relationship. A closer or more significant union-employer relationship is difficult to conceive. Also, the NLRB refuses to defer hiring hall disputes to the grievance and arbitration procedures of the parties agreement in the belief that the interests of the aggrieved employee may be in conflict with the parties to the agreement, the union

and the employer. *Local Union 675, I.B.E.W. AFL-CIO* (S & M Electric Co), 223 NLRB 1499 (1976); *Journeymen Pipe Fitters Local No. 392* (Kaiser Engineers, Inc.) 252 NLRB 417 (1980); The Developing Labor Law (Volume II, 2nd Edition, B.N.A. 1983) at p. 1405. This fact also underscores the close link between the employer and the union inherent in the Union serving as a clearinghouse for the employer's manpower needs.

E. Hiring Hall Provision Of Southwest Union Agreement Demonstrating Deep and Interlocking Employer Union Relationship.

The Administrative Law Judge of the NLRB quotes from the preamble of the referral provision of the Master Labor Agreement between Southwest and the Union, (App. 115a, 116a) apparently for

the proposition that the hiring hall provisions have an impact on the employees. Yet, so too do the union security and checkoff provisions of the labor agreement inasmuch as they call for periodic monthly contributions by the employee to the union. But, as has been previously discussed, these provisions terminate with the expiration of the labor agreement. Furthermore, review of the entire Section 3 of the Southwest-Union labor agreement describing the hiring hall establishes that these provisions describe a relationship which is above all else, one between the employer and the union, not the employer and the employee. (App. 115a) For example, Section 3(a) reads in relevant part as follows:

All employees required by the Employer shall be furnished and referred by the Union to the Employer off the hiring list. Employers who have employed ironworkers within the territory covered by this agreement for the preceding twelve (12) months shall have a right to call for any properly qualified ironworker off the "A" list. The employer shall have the right to reject any applicant or steward referred by the local union.

Section 3(b) reads as follows:

"The Union shall select and refer applicants for employment without discrimination against such applicants for reason of membership or non-membership in the union and such selections and referrals shall not be affected in any way by rules, regulations, by-laws, constitutional provisions or any other aspect or obligation of the Union membership policies or requirements."

Section 3(c) reads as follows:

"The Union and Employer agree to the employment of Ap-

prentices. The Union shall select and refer Apprentices in accordance with the apprenticeship standards for the Bridge, Structural, Ornamental and Reinforcing Ironworkers Industry for the State of Arizona."

Section 3(g) reads as follows:

"Employers shall advise the Union of the number of applicants needed. The Union shall refer applicants to the Employer by first referring applicants in group "A" in the order of their places on said list and then referring applicants in the same manner successively from the list in group "B", group "C" and group "D". Any applicant who is rejected by the Employer shall be returned to the appropriate place within the Group to be referred to another employer in accordance with the position of the Group and placed within the Group.

Section 3(h) indicates that:

"The order of referral set forth above shall be followed except in cases where Employers require and call for employees

possessing special skills and abilities in which case the Union shall refer the first applicant on the "A" list possessing such special skills and abilities.

Section 3(j) demonstrates:

"In the event that the referral facilities maintained by the Local Union are unable to fill the requisition of an Employer for employees within a seventytwo (72) hour period after such requisition is made by the Employer (Saturdays, Sundays, and holidays excepted), the Employer may employ applicants directly at the job site. In such event, the employer will notify the Local Union of the names and dates of such hirings. Arrangements shall be made for the applicants to complete an application for referral.

Section 3(k) reads as follows:

"The Local Union, through its Examining Board shall examine all job applicants who have not previously passed an examination conducted by a duly constituted

> Local Union affiliated with the National Association of Bridge, Structural, Reinforcing and Ornamental Ironworkers in order to determine whether they are qualified to perform the work of the craft as a mechanic and be eligible for referral." (See Appendix 117a-128a)

In short, it is apparent that the hiring hall mechanism defines a close working relationship between the employer and the union whereby the employer permits the union to participate in its hiring practices.

F. Prior Supreme Court Analysis Of Hiring Hall Is Supportive of Southwest position

Indeed, the Supreme Court recognized this incontrovertible fact in *Local 357, Teamsters v. NLRB*, 365 U.S. 667, 81 S. Ct. 335, 6 L.Ed.2d 11 (1961). The Court quoted Senator Taft, with approval, as

follows: "The employer should be able to make a contract with the union as an employment agency. The union frequently is the best employment agency. The employer should be able to give notice of vacancies, and in the normal course of events, to accept men sent to him by the hiring hall." (See, too *General Building Contractors Association v. Pennsylvania*, 458 U.S 375 102 S. Ct. 3141, 73 L.Ed.2d 835 (1982) where the Court describes the close union-employer nexus embodied in the hiring hall arrangement.)

The manifest employer-union relationship marking the hiring hall described in the above-quoted sections of the labor agreement simply tracks the Supreme Court's discussion in this

regard. Indeed, the analysis of the ALJ (the only analysis undertaken by the NLRB) neglects to even consider the NLRB's own well-developed case law which hinges the survivability of a particular provision of the agreement on whether the provision may be subsumed under the employer-employee relationship or the employer-union relationship. *See e.g. Sir James, Inc. supra.* This glaring omission in and of itself saps the analysis of the ALJ of any vitality and necessarily undermines the NLRB analysis of the hiring hall issue which was completely predicated on the ALJ's decision. And, the panel essentially adopted the abbreviated NLRB analysis and so its decision too is beset by the these same serious shortcomings.

Finally, the impact of the panel's decision on labor management relations will be horrendous and inconsistent with the recent Ninth Circuit decision in *Machinists Local 1327, International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge 115 v. NLRB*, 725 F.2d 1212 (9th Cir. 1984). There, the court stressed that strike breaking (there post-resignation employee strike breaking) is inimical to the union's viability and may set off a chain reaction capable of destroying the collective bargaining environment. If the terms and conditions of employment described in hiring hall provisions of an expired labor agreement survive the agreement's expiration, the union will be

placed in the anomalous situation, in the event of a strike upon the expiration of the agreement, of referring employees to the employer to replace the striking employees.

In *Nolde, supra*, the Supreme Court found that ". . . the termination of a collective bargaining agreement works an obvious change of relationship between employer and union." *Nolde, supra*, at 254. Southwest submits that one of these changes in the union employer relationship upon expiration of the agreement is the hiring hall, one of the most, if not the most, close and interlocking union - employer relationships in the employment setting.

CONCLUSION

For the foregoing reasons, this petition for Writ of Certiorari should be granted. This case involves an important question of federal law which has not been settled by this Court. The panel's decision and the underlying Board decision present the only decided case law on this issue of the utmost significance to many industries and these decisions are irretrievably flawed and erroneous.

RESPECTFULLY SUBMITTED this 7 day of January, 1985.

SNELL & WILMER

By: _____
Robert J. Deeny
Thomas J. Kennedy

3100 Valley Bank Center
(602) 257-7388
Phoenix, Arizona 85013
Attorneys for
Petitioner

APPENDIX "A"

Filed
July 3, 1984
Phillip B. Winberry
Clerk, U.S. Court of Appeals

FOR PUBLICATIONS
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD Petitiioner and INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, REINFORCING AND ORNAMENTAL IRON WORKERS, LOCAL UNION NO. 75, AFL-CIO, Intervenor, vs. SOUTHWEST SECURITY EQUIPMENT CORPORATION, Respondent.	)	No. 83-7286 OPINION

On Petition for Enforcement
of an Order of the National
Labor Relations Board

Argued and Submitted December 13, 1983 Before: HUG, PREGERSON, and NORRIS, Circuit Judges.

PREGERSON, Circuit Judge:

The National Labor Relations Board (the Board) petitions for enforcement of an order finding Southwest Security Equipment Corp. (Southwest) guilty of violating National Labor Relations Act (NLRA) § 8(a)(5), 29 U.S.C. § 158(a)(5) (1976).[1/] The Board found that Southwest failed to honor the fringe benefit, hiring hall,[2/] and grievance arbitration provisions of its collective bargaining agreement with Local 75 of the Bridge Workers Union (the union).

In a pro forma opinion, 262 N.L.R.B. 665 (1982), the Board adopted the finding of the administrative law judge (ALJ) that Southwest violated its duty to bargain in good faith when it unilaterally abrogated the hiring hall provision of an expired collective bargaining contract.[3/]

On petition for enforcement, the Board argues that Southwest may not properly attack the merits of the Board's hiring hall decision because the company failed to comply with NLRA § 10(e), 29 U.S.C. § 160(e) (1976), and Board rules requiring a dissatisfied party to file timely and specific exceptions to an unfavorable ALJ report. In the alternative, the Board contends that the hiring hall provision, as a term or condition of

employment within the meaning of NLRA § 8(d), 29 U.S.C. § 158(d) (1976), survives the expiration of the collective bargaining agreement until employer and union bargain to impasse over the fate of the provision in the next contract.

Although we think that Southwest filed timely exceptions, we agree with the Board's finding that the hiring hall provision survived the contract's expiration. Therefore, we enforce the Board's order.

FACTS

Southwest sells, services, and installs bank security equipment. In 1979, the Board certified the Bridge Workers Union as the exclusive bargaining agent

for employees working out of the company's Phoenix, Arizona premises.

After several fits and starts, Southwest President Rick Iglesias signed the union's master agreement with the Arizona Steel Field Erectors Association, a multi-employer group.[4/] The contract, effective from August 1, 1977, through July 31, 1980, covered employees who fabricated, erected, and maintained steel used in safes, vaults, vault doors, safe deposit boxes, and other bank security devices. The contract required employers to hire workers through the union's hiring hall, and to make payments on their behalf to various union benefit funds.

Between April 22, 1980, and May 16, 1980, Southwest requested, and the union

referred, eight employees. Sometime in May, Southwest stopped requesting referrals. Then on May 14, Iglesias informed the union that Southwest would subcontract out for all bargaining unit work. The next day, the union sent a letter to both Iglesias and the multi-employer association stating that the Bridge Workers intended to file a grievance pursuant to the master agreement. Iglesias failed to respond to either the letter or the multi-employer group's attempts to schedule a grievance hearing.

On June 20, the multi-employer group notified Iglesias that it had scheduled a grievance hearing for July 1. Southwest failed to appear at the hearing, and on July 2, the arbitration committee issued

a decision finding the employer guilty of violating, among other things, the master agreement's hiring hall clause. The union followed up by filing unfair labor practice charges on July 22. Meanwhile, the master agreement expired on July 31.

A year later, on July 29, 1981, the ALJ issued a report concluding that Southwest had violated § 8(a)(5) in failing to honor the fringe benefit, hiring hall, and grievance arbitration provisions. On August 20, acting within the Board's 20-day procedural framework for filing objections, Southwest submitted general exceptions to the ALJ's findings. Exception 5 objected to the ALJ's conclusion of law that

> [b]y failing and refusing to abide by the fringe benefit,

> referral, and grievance and arbitration provisions of the 1977-1980 Arizona Master Labor Agreement . . . thereby unilaterally changing the terms and conditions of employment of its employees, Respondent has engaged in unfair labor practices violating section 8(a)(5) and (1) of the Act.

Brief for Respondent Southwest Security Equipment Corp. at 8 (quoting from ALJ report) (emphasis in brief).

Similarly, exception 6 identified a particular ALJ finding regarding "referral," but did not provide specific reasons why the employer objected to the finding.

But on August 26, 1981, the union filed its own limited exceptions to the ALJ's decision. On September 4, Southwest filed a brief responding to the union's exceptions and clarifying

Southwest's reasons for objecting to the ALJ's findings on "referral." The September 4 brief reasoned that Southwest had not committed an unfair labor practice because the hiring hall provision did not survive the master agreement's expiration.

Finally, nearly 10 months later, the Board adopted pro forma the ALJ's report. 262 N.L.R.B. 665 (June 30, 1982). Later, on November 12, 1982, the Board rejected Southwest's motion for reconsideration. The Board now petitions for enforcement.

STANDARD OF REVIEW

Two standards of review govern our inquiry. As to the timeliness of the employer's exceptions, we must uphold the Board's decision unless the Board acted

arbitrarily or capriciously. *NLRB v. United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industries*, 704 F.2d 1164, 1166 (9th Cir. 1983); see also K. Davis, Administrative Law Treatise § 30.10 (1958) (reviewing court may overturn agency's application of properly-adopted regulation only if application is arbitrary or capricious). But in doubtful situations, we merely give "weight" to the Board's application of the Act. *Joint Council of Teamsters No. 42 v. NLRB*, 702 F.2d 168, 170 (9th Cir. 1981) (citing *NLRB v. Denver Building & Construction Trades Council*, 341 U.S. 675, 692 (1951)), cert. denied, 104 S. Ct. 100 (1983).

As to the merits of the hiring hall decision, we must defer to the Board's interpretation of the scope of the bargaining obligation under § 8(d) if that interpretation is "reasonably defensible." *Ford Motor Co. v. NLRB*, 441 U.S. 488 497 (1979).

ANALYSIS

A. The Procedures: Specificity of Exceptions

1. The NLRA and the Board's rules.

The NLRA forbids us from considering a matter not presented to the Board or to the ALJ. Section 10(e) provides:

> No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court [of appeals], unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.

29 U.S.C. § 160(e) (1976).

To implement § 10(e), the Board has promulgated several regulations. Rule 102.46(b), for instance, sets out four requirements that every exception to an ALJ's findings must meet.[5/] One requirement commands the party to "state the grounds for the exception[]." 29 C.F.R. § 102.46(b)(4) (1983). The rule adds that the Board may disregard or consider waived any exceptions failing to conform to these requirements. Id. Moreover, Rule 102.48(a) provides for pro forma Board adoption of the ALJ's findings when the party fails to meet the requirements of Rule 102.46(b).[6/] Finally, Rule 102.46(a) requires the excepting party to file its objections with

the Board within 20 days of the date the ALJ transfers the case to the Board. Id. § 102.46(a).

2. Applying the requirements. Relying principally on *Marshall Field & Co. v. NLRB*, 318 U.S. 253, 255 (1943), the Board argues that Southwest's exceptions were so unspecific that they could not effectively apprise the Board of an alleged error in the ALJ's findings. The Board reasons that its rules plainly call for more than Southwest's short demurrer in exceptions 5 and 6, filed August 20, 1981. In fact, the Board says, Southwest did not really identify its quarrel with the ALJ's proposed disposition of the hiring hall clause until September 4, 1981, when it filed a brief opposing the

union's limited exceptions to other parts of the ALJ's report. But the Board contends that this clarification came too late to preserve the hiring hall question for the Board or this court. By then, the 20-day filing deadline had passed.

For three reasons, we think the Board arbitrarily applied § 10(e) and its rules to the facts of this case.

First, Southwest meets this Circuit's test for determining sufficiency of notice. In *NLRB v. Giustina Bros. Lumber Co.*, 253 F.2d 371 (9th Cir. 1958), we held that Rule 102.46(b) prohibited the respondent from raising an issue before the Ninth Circuit where respondent's objection had been "so ambiguous as to be totally ineffective" in "adequately

appris[ing]" the Board of the excepting party's intentions. Id. at 374 (emphasis added). This is a stringent test. But Southwest's exception to the ALJ's referral, whether considered alone or together with its brief of September 4, constituted a much better effort than "totally ineffective" notice.

Second, although the NLRA vests the Board with great discretion to resolve unfair labor practice disputes, the statute does not permit the Board to use its authority "in a manner [that] deprives a party of a fair and adequate hearing." *NLRB v. Zeno Table Co.*, 610 F.2d 567, 569 (9th Cir. 1979) (citation omitted).

Southwest should not be penalized for making adequate, if somewhat

inartful, efforts to raise the hiring hall question below. Even if its August 20 effort was insufficient, its September 4 brief--which was submitted only 15 days after the deadline for filing exceptions had passed--certainly cured the problem and put both the ALJ and the Board on notice about Southwest's hiring hall contention. Indeed, the Board would be hard-pressed to argue that Southwest's poor notice somehow prejudiced, *see Zeno Table*,- 610 F.2d at 569, the proceedings. After all, nearly 10 months passed between the date Southwest submitted its September 4 brief clarifying its position, and the date that the Board issued its pro forma decision.

Third, the Board's own rules and precedents command it to read its procedural rules liberally. E.g., 29 C.F.R. § 102.121 (1983) ("The rules and regulations in this part shall be liberally construed to effectuate the purposes and provisions of the act."); *Daisy's Originals, Inc.*, 187 N.L.R.B. 251, 251 n.1 (1970) ("[T]he Board makes every effort to apply its rules with such lenience as will effectuate the purposes of the act." (citation omitted)).

The Board cites a string of cases holding against parties who failed to meet the Board's procedural standards. But all these cases are distinguishable as extreme examples whose facts, taken as a whole, showed that the excepting

parties filed tardily, ambiguously, or not at all. *See, e.g., NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 350 (1953) (general exception alleging only that decision was contrary to and unsupported by law held insufficient); *Stephenson v. NLRB*, 614 F.2d 1210, 1214-15 (9th Cir. 1980) (per curiam) (exception relying simply on Board Chairman's dissent below held too ambiguous); *NLRB v. STR, Inc.*, 549 F.2d 641, 642 (9th Cir. 1977) (complete failure to file exceptions held insufficient); *NLRB v. Selvin*, 527 F.2d 1273, 1276 (9th Cir. 1975) (exception filed 7 months after filing deadline had passed held insufficient); *NLRB v. International Association of Bridge Workers*, 473 F.2d 816, 817 (9th Cir. 1973) (per

curiam) (general exceptions held insufficient for failure to make "any other reference" below to contention urged before court of appeals); *NLRB v. Pinkerton's National Detective Agency*, 202 F.2d 230, 233 (9th Cir. 1953) (complete failure to raise issue below held insufficient).

We conclude, then, that Southwest filed timely exceptions to the ALJ's report. Therefore, the merits of the hiring hall decision are properly before us.

B. The Merits: Hiring Hall Clause Survivability

Hiring hall provisions are common in the construction industry, "where jobs tend to be unpredictable, of short duration, and not with any single employer." R. Gorman, Basic Text on Labor Law 643 (1976). The hiring

hall serves as a "union-operated clearinghouse which matches employers seeking a transitory workforce [with] employees seeking work." Id.

The well-established presumption is that an employer violates his § 8(a)(5) duty to bargain in good faith if he unilaterally changes the terms of a collective agreement, even after that agreement has expired. As we recently put it:

> [T]he collective bargaining agreement survives its expiration date for purposes of marking the status quo as to wages and working conditions. The employer is required to maintain that status quo following the expiration of the collective bargaining agreement until the parties negotiate a new agreement or bargain in good faith to impasse.

NLRB v. Carilli, 648 F.2d 1206, 1214 (9th Cir. 1931) (citing *Peerless Roofing Co.*

v. NLRB, 641 F.2d 734, 735 (9th Cir. 1981); *Clear Pine Mouldings, Inc. v. NLRB*, 632 F.2d 721, 729 (9th Cir. 1980), *cert. denied*, 451 U.S. 984 (1981)); *see also American Distributing Co. v. NLRB*, 715 F.2d 446, 449 (9th Cir. 1983) (applying same principle); *Stone Boat Yard v. NLRB*, 715 F.2d 441, 444 (9th Cir. 1983) (same); *NLRB v. Sky Wolf Sales*, 470 F.2d 827, 830 (9th Cir. 1972) (same).

The Board contends that under the law established in these cases, Southwest had the duty to honor the hiring hall provision of the master agreement, even after July 31, 1980. The Board reasons that the hiring hall provision, a subject of mandatory bargaining within the meaning of § 8(d), *See NLRB v. Tom Joyce*

Floors, Inc., 353 F.2d 768, 771 (9th Cir. 1965), is no different from employee welfare fund and benefits clauses, which routinely survive contract expiration, *see, e.g., Carilli*, 648 F.2d at 1214 (preserving employer's payments into union trust fund); *Clear Pine Mouldings*, 632 F.2d at 729 (preserving existing arrangement for implementing health and welfare plan).[7/]

But relying on the Board's analysis in *Gordon L. Rayner (Bay Area Sealers)*, 251 N.L.R.B. 89 (1980), *enf'd as modified*, 665 F.2d 970 (9th Cir. 1982), Southwest contends the fact that the hiring hall provision is a mandatory bargaining subject does not automatically preserve the provision upon the

contract's expiration. Quoting *Rayner*, Southwest argues that only

> those terms and conditions established by the contract and governing the employer-employee, as opposed to the employer-union, relationship survive the contract and present the employer with a continuing obligation to apply those terms and conditions . . . .

Rayner, 251 N.L.R.B. at 90.

According to Southwest, the reasoning behind the Board's own precedents contemplates that only certain types of contract provisions--such as fringe benefits and other "economic benefits or remunerations that the employees receive[] from [the employer] in exchange for their labors," *Sir James, Inc.*, 183 N.L.R.B. 256, 259 (1970) (Webster, Tr. Ex.)--are terms or conditions that fit within the

"employee/employer" rubric. Hiring hall provisions, Southwest says, are designed to protect the power of unions as institutions, rather than that of individual workers. At the very least, Southwest argues, the Board should conduct its *Rayner* analysis on the record before deciding that hiring hall provisions are a part of the employer/employee relationship for purposes of § 8(a)(5); the Board should not have adopted pro form the ALJ's findings on this important matter.

Southwest's argument falls for two reasons.

First, the Board has long held, after careful consideration, that a hiring hall provision is an essential part of the employee/employer relationship. In

Houston Chapter, Associated General Contractors, 143 N.L.R.B. 409 (1963), enf'd, 349 F.2d 449 (5th Cir. 1965), cert. denied, 382 U.S. 1026 (1966), the Board considered whether the union's demand for a hiring hall provision was a mandatory subject of collective bargaining negotiations within the meaning of § 8(a)(5) and § 8(d). The Board ruled that it was. Borrowing language from *NLRB v. Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, 350 (1958), the Board explained:

> The second test is whether the subject sought to be bargained about has regulated the relations between the employer and his employees. Certainly, the matter of what standards are to be applied in determining priorities for employment must of necessity regulate relations

between the employer and the employees.

Houston Chapter, Associated Gen. Contractors, 143 N.L.R.B. at 412 (emphasis added). Even the dissent agreed with this assessment. See id. at 415-16 (Rodgers & Leedom, Members, dissenting) ("[T]he hiring hall is not peripheral to industrial relations. It goes right to the core of the employer-employee relationship . . . .").

Second, Southwest's argument misapprehends the importance of the hiring hall in industries that use it. Without the hiring hall, the construction employee would find it very difficult to find work or to establish seniority and entitlement to union benefits. Work is sporadic. An employer may need help for a

day, a month, or a year. Unless he is lucky, the potential employee may spend more time looking for work than he does actually working. But the hiring hall brings employer and prospective employee together. When an employer needs help, he turns to the union. The union maintains a list of people who need work, and promises to fill employer needs as they arise. See R. Gorman, supra at 643.

In short, the construction industry hiring hall is an essential component of the employer/employee relationship. In a sense, the hiring hall is not only part of that relationship, but also the catalyst that makes the relationship possible.

CONCLUSION

We hold that the hiring hall provision, which is properly presented on petition for enforcement, survived the expiration of the collective bargaining agreement. Therefore, we ENFORCE the Board's order.

FOOTNOTES

1. The Board also found Southwest guilty of violating NLRA § 8(a)(1), 29 U.S.C. § 158(a)(1) (1976). Section 8(a)(1), which makes it an unfair labor practice for an employer to interfere with an employee's right to engage in or refrain from concerted activities, is often appended as boilerplate to Board complaints charging violations of other § 8(a) provisions.

2. A hiring hall is "a union-operated clearinghouse which matches employers seeking a transitory workforce [with] employees seeking work." R. Gorman, Basic Text on Labor Law 643 (1976). Hiring hall provisions are common in the construction industry. See generally infra pp. 9-10, 12-13.

3. In opposing the Board's petition for enforcement, Southwest contests only the survivability of the hiring hall clause, and not the survivability of the fringe benefit and grievance arbitration clauses.

4. When the union's representative first contacted Southwest, Iglesias refused to sign the master agreement and said he wanted a special contract because

Southwest installed electrical wiring as well as security devices. The master agreement's jurisdiction did not include electrical work. Nonetheless, Iglesias called the union several months later to say he would sign the agreement.

5.

> (b) Each exception (1) shall set forth specifically the questions of procedure, fact, law, or policy to which exceptions are taken; (2) shall identify that part of the administrative law judge's decision to which objection is made; (3) shall designate by precise citation of page the portions of the record relied upon; and (4) shall state the grounds for the exceptions and shall include the citation of authorities unless set forth in a supporting brief. . . .

29 C.F.R. § 102.46(b) (1983).

6.

> (a) In the event no timely or proper exceptions are filed as herein provided, the findings, conclusions, and recommendations of the administrative law judge as contained in his decision shall, pursuant to section 10(c) of the act, automatically become the decision and order of the Board.

Id. § 102.48(a).

7. The administrative law judge analogized the survivability of hiring hall provisions to the survivability of grievance arbitration provisions. In so doing, she relied on the Board's decision in *American Sink Top & Cabinet Co.*, 242 N.L.R.B. 408 (1979). See 262 N.L.R.B. at 669 (Robbins, A.L.J.).

In the present case, however, two members of the Board, in holding that the hiring hall provision survives, expressly

disclaim reliance on *American Sink Top.* See 262 N.L.R.B. at 665 n.1 (Van de Water, Chairman & Hunter, Member). *But see O'Connor Co. v. Carpenters Local 1408,* 702 F.2d 824, 825 (9th Cir. 1983) ("Termination of a collective bargaining agreement does not necessarily extinguish a party's duty to arbitrate grievances arising under the contract." (citation omitted)).

In any event, we can resolve the case before us without deciding whether an analogy to arbitration clause survivability is appropriate.

Filed
July 3, 1984
Phillip B. Wineberry
Clerk, U.S. Court of Appeals

Norris, J., Circuit Judge, dissenting:

I cannot agree with the majority's analysis of the issue presented by Southwest Security's failure to comply with Board regulations governing the degree of specifity with which parties must make exceptions to an ALJ's findings. As the majority recognizes, we should overturn the Board's decision that these regulations bar Southwest Securities from attacking the merits of the ALJ's decision only if the Board acted arbitrarily. See supra at ____. Because the Board applied the plain language of the regulations to the facts of this case, I

cannot conclude that the Board's decision was arbitrary. The exceptions that Southwest Security filed on August 20th -- the only exceptions filed before the deadline passed -- plainly did not meet the requirements of regulation 102.46(b)(4). Although Southwest Security's exceptions refer obliquely to the hiring hall issue, they do not "include citation of authorities" or set forth "the grounds for the exceptions," as required by the regulation. See id.

I am not persuaded by the reasons offered by the majority to support its conclusion that the Board's conduct was arbitrary. The majority takes the position that any defects in the exceptions of August 20th were cured by a brief

filed on September 4th. But the brief filed on September 4th was late; it was filed after the twenty-day deadline prescribed by regulation 120.46(a). If I were a member of the Board, I might well allow a late brief to be included in the record so long as no party was prejudiced by the addition. As a judge reviewing the Board's decision, however, I cannot say that the Board was being arbitrary when it refused to consider a brief filed after a deadline explicitly set forth in the governing regulations.

Accordingly, we should consider the August 20th filing only. Southwest Security's exceptions in that filing are no less sketchy than those in other cases where the Board's decision to disregard

exceptions was upheld on appeal. *See e.g., NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 350 (1953) (exception alleging only that decision was contrary to law); *NLRB v. International Association of Bridge Workers*, 473 F.2d 816, 817 (9th Cir. 1973) (per) curiam) (exception of insufficient particularity).

The majority further maintains that Southwest Security's exceptions meet our Circuit's test for determining sufficiency of notice. But the majority inaccurately formulates that test by citing a case, *Giustiana Brothers v. NLRB*, 253 F.2d 371 (9th Cir. 1958), which is inapposite. *Giustiana Brothers* held that the Board did not act arbitrarily in disregarding exceptions that were "so

ambiguous as to be totally ineffective." Id. at 374. The case thus cannot be used as authority for the majority's decision that the Board did act arbitrarily in disregarding these exceptions. The holding in *Giustiana Brothers* is, rather, the converse of the holding the majority is fashioning in this case. Moreover, even though Southwest Security exceptions may not be "totally ineffective," as were the exceptions in *Giustiana Brothers*, the exceptions here are admittedly deficient nonetheless. And nothing in *Giustiana Brothers*, stands for the contrary.

Finally, the majority reasons that the Board's enforcement of regulation 102.46 violates regulation 102.121, which

states that all regulations should be "liberally construed to effectuate the purposes and provisions of the Act." I fail to see how this general provision supports a decision that the Board's application of regulation 102.46 to the specific facts of this case was arbitrary. After all, Rule 1 of the Federal Rules of Civil Procedure states that courts shall construe those rules "to secure the just, speedy and inexpensive determination of every action." If a district court refused to consider an item filed after a deadline set forth in the local rules of court, however, I doubt we would employ Rule 1 to find that the district court abused its discretion -- absent unusual circumstances not

present in this case -- if the party who filed the item, like Southwest Security, failed to show good cause for missing the deadline. The majority's reliance on the general language of regulation 102.121 is thus simply makeweight.

In sum, I see no basis for reaching the merits of the hiring hall issue without intruding upon the Board's discretion to regulate its internal process of administrative appeals. In this case, the Board did neither more nor less than enforce the text of regulation 102.46. Nevertheless, the majority concludes that the Board acted arbitrarily in treating the regulation as if it meant what it said. The majority is thus fashioning a precedent that will frustrate

the Board in its legitimate efforts to induce parties to fairly state at least the substance of their legal arguments in a timely manner. I believe the Board has a tough enough job in managing its considerable caseload without being faced with the new obstacle created by today's decision.

Accordingly, I respectfuly dissent.

APPENDIX "B"

Received
July 06, 1982
SNELL & WILMER

VJH

262 NLRB No. 79

D--8968
Phoenix, AZ

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR
RELATIONS BOARD

SOUTHWEST SECURITY
EQUIPMENT CORPORA-
TION

and Case 28--CA--6007

INTERNATIONAL ASSO-
CIATION OF BRIDGE,
STRUCTURAL, REIN-
FORCING AND ORNAMENTAL
IRON WORKERS, LOCAL
UNION NO. 75, AFL--CIO

DECISION AND ORDER

On July 29, 1981, Administrative Law Judge Earldean V. S. Robbins issued the

attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the Charging Party filed cross-exceptions and a supporting brief. In addition, Respondent filed an answering brief. The Charging Party then filed a reply, moving to strike a portion of Respondent's answering brief. Respondent opposed the motion.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a threemember panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to

affirm the rulings, findings, and conclusions[1/] of the Administrative Law

---

1/ The Charging Party excepts only to the Administrative Law Judge's finding that the contract between the parties expired on July 31, 1980, a finding with which we agree. In its brief in response to this exception, Respondent for the first time takes issue with the Administrative Law Judge's finding that the hiring hall referral provision of that contract survived the expiration of the agreement. We find merit in the Charging Party's contention that Respondent's claim, which amounts to an additional exception to the Administrative Law Judge's Decision, is untimely. Sec. 102.46 of the Board's Rules and Regulations, Series 8, as amended. Accordingly, the Charging Party's motion to strike that portion of Respondent's answering brief relating to the hiring hall provision is granted and, in the absence of a timely exception, we adopt pro forma the Administrative Law Judge's finding with respect to the hiring hall provision.

(footnote continued on following page)

Judge and to adopt her recommended Order.[2]

ORDER

Pursuant to section 10(c) of the National Labor Relations Act, as amended,

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[1] (footnote continued from previous page)

In the absence of exceptions, Chairman Van de Water and Member Hunter would adopt pro forma the Administrative Law Judge's conclusion that the arbitration provision of the parties' collective-bargaining agreement survived the expiration of that agreement. In so doing, they specifically disclaim any reliance on *American Sink Top & Cabinet Co., Inc.*, 242 NLRB 408 (1979).

[2] With respect to the Administrative Law Judge's recommended Order as it relates to Respondent's payment of contributions to various benefit funds, said payments shall be determined in the manner set forth in *Merryweather Optical Company*, 240 NLRB 1213, 1216, fn. 7 (1979).

the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Southwest Security Equipment Corporation, Phoenix, Arizona, its officers, agents, successors,

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the

National Labor Relations Board

An Agency of the United

States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated

the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT refuse to abide by the terms of our collective-bargaining

agreement with International Association of Bridge, Structural, Reinforcing and Ornamental Iron Workers, Local Union No. 75, AFL--CIO.

WE WILL NOT refuse to bargain collectively with the above-named Union as the exclusive bargaining representative of our employees in the following appropriate unit.

All employees engaged in field fabrication and/or erection and/or contracted maintenance of structural, ornamental and reinforcing steel work coming within the jurisdiction of the International Association of Bridge, Structural, Reinforcing and Ornamental Iron Workers Union as set forth in our collective bargaining

agreement with the above-named Union.

WE WILL NOT unilaterally change any terms or conditions of employment of employees in the above unit during the life of any union contract without first reaching agreement with the Union about such changes.

WE WILL, upon the Union's request, recognize and bargain with the above-named Union concerning the employees in the above-described unit.

WE WILL, upon the Union's request, rescind all unilateral changes made in the terms and conditions of employment of employees in the above described unit which are

contained in the referral, fringe benefit, and grievance and arbitration provisions of the 1977--80 Arizona Master Labor Agreement between said Union and the Arizona Steel Field Erectors Association incorporated in our April 22, 1980, Memorandum Agreement with said Union.

WE WILL, upon the Union's request, give effect retroactively to the referral, fringe benefit, and grievance and arbitration provisions set forth in said Memorandum Agreement and Master Labor Agreement, and make whole our employees and would be employees for losses suffered by reason of our failure to comply with those provisions, including the

hiring hall provisions, with interest.

WE WILL, upon the Union's request, make all contributions to the health and welfare, training, supplemental benefits, vacation savings, and pension funds, and pay the prescribed fees to administer said funds, as provided in the 1977--80 Arizona Master Labor Agreement and the various Contributing Employers Agreements signed by us relating to said funds, which have not been paid and which would have been paid absent our unlawful discontinuance of such payments.

SOUTHWEST SECURITY EQUIPMENT CORPORATION

_____

(Employer)

Dated _____ By _____

(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 3030 North

Central Avenue, Second floor, Phoenix, AZ 85012, Telephone 602--241--2362.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights under the Act.

and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

Dated, Washington, D.C. June 30, 1982

John R. Van de Water,
Chairman

Howard Jenkins, Jr.,
Member

Robert P. Hunter,
Member

(SEAL) NATIONAL LABOR RELATIONS
BOARD

JD-(SF)-205-81
Phoenix, AZ

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA

SOUTHWEST SECURITY
EQUIPMENT CORPORA-
TION

and Case 28-CA-6007

INTERNATIONAL AS-
SOCIATION OF BRIDGE,
STRUCTURAL, REINFOR-
CING AND ORNAMENTAL
IRON WORKERS, LOCAL
UNION NO. 75, AFL-CIO

D. Kim Lough, Esq. of
Phoenix, AZ, for the
General Counsel.

Paul B. Supton, Esq.,
of Van Bourg, Allen,
Weinberg & Roger,
San Francisco, CA
for the Charging Party.

Robert J. Deeny, Esq.,
of Snell & Wilmer,
Phoenix, AZ, for
the Respondent.

DECISION

STATEMENT OF THE CASE

EARLDEAN V.S. ROBBINS, Administrative Law Judge: This matter was heard by me in Phoenix, Arizona on April 14, 1981. The charge was filed by International Association of Bridge, Structural, Reinforcing and Ornamental Iron Workers, Local Union No. 75, AFLCIO, herein called the Union, and served on Southwest Security Equipment Corporation, herein called Respondent, on July 24, 1980. The complaint, which issued on August 29, 1980, alleges that Respondent violated Section 8(a)(1) and (5) of the National Labor

Relations Act, as amended, herein called the Act.

The principal issue herein is whether Respondent repudiated it collective-bargaining agreement with the Union.

Upon the entire record including my observation of the demeanor of the witnesses, and after due consideration of the post-hearing briefs filed by the parties, I make the following:

Findings of Fact

I. Jurisdiction

At all times material herein, Respondent, an Arizona corporation with an office and place of business in Phoenix, Arizona, has been engaged in the business of selling, servicing and installing bank security equipment. Respondent, in the

course and conduct of its business operations during the 12 month period preceding the issuance of the complaint herein, has purchased and received goods and products valued in excess of $50,000 directly from suppliers located outside the State of Arizona.

The complaint alleges, Respondent admits, and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. Labor Organization

The complaint alleges, Respondent admits, and I find that the Union is now, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. Facts

There is little dispute as to the essential facts herein. On October 29, 1979, the Union was certified as the collective-bargaining representative of all installers employed by Respondent at its Phoenix, Arizona facility. Thereafter Respondent and the Union engaged in several negotiation sessions in November and December 1979. Among other things, the scope of unit work was discussed during some of these sessions.

Ed Gallagher, who was negotiating for the Union, testified without contradiction that in the first negotiation session the Union proposed its agreement

negotiated between the Arizona Steel Field Erectors Association and the Union, herein referred to as the Master Agreement. Rick Iglesias, president of Respondent, proposed that they negotiate a special agreement covering only the specific kind of work performed by Respondent Gallagher pointed out the jurisdictional claims outlined in the Master Agreement and said the Union was interested in the installation of bank vault doors, cladding on the inside of drive-in windows, night depository boxes, installation of drive-in windows, drops and other apparatus within the pneumatic system for automatic teller windows and the replacement of parts for any of the items installed.

Gallagher further testified that at one of the November or December meetings, Iglesias explained the intricacies of the electronics attendant to vault installations and asked if the Union had any electricians with the expertise to do electronic installations. Iglesias then explained that there is a wired electronic system that has to be installed before the job is complete, but that it is not done simultaneously with the installation of the vault or vault door. Iglesias said he had people who were experienced in that work. Gallagher said the Union did not necessarily claim any of the electronics work, and referred specifically to the console that controls the time lock, camera systems and the

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photoelectric eye, because that was not taught in the Union's apprenticeship classes. Thereafter, there was no further discussion for this subject. No agreement was reached as to covered work in the November and December 1979 meetings and no further meetings were scheduled after December 1979.

Gallagher further testified, without contradiction, that on around April 19 or 20, 1980,[1/] Iglesias telephoned either Gallagher or Harry Steele, the business manager of the Union, and said he was ready to sign the agreement. Steele instructed Gallagher to go to Respondent's

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1/ All dates hereinafter will be in 1980 unless otherwise indicated.

office and get the agreement signed. On April 22 Gallagher went to Respondent's office. Iglesias said "give me the contract, I'll sign the contract." There was no discussion as to scope of unit work or exclusions from unit work covered. Iglesias and Gallagher then signed an agreement, the body of which reads:

MEMORANDUM AGREEMENT

This Agreement is made this 22nd day of April 1980.

Whereas, the Employer recognizes the Union as the Collective Bargaining Representative of the employer's employee performing work within the recognized jurisdiction of the Union; and

Whereas, the parties intend by this Memorandum Agreement to eliminate

multiplicity of collective bargaining in the industry, to provide for uniform conditions of employment among the several employers recognizing the Union, and to simplify the record keeping connected with the execution of lengthy agreements:

Now, therefore, it is mutually agreed as follows:

1. The parties hereto agree to comply with and be bound by all the terms and provisions of that certain Collective Bargaining Agreement negotiated between Steel Fabricators and Erectors Negotiating Committee of the Arizona Steel Field Erectors Association and the International Association of Bridge, Structural, Reinforcing and Ornamental Iron Workers, Local No. 75, which agreement is dated

August 1, 1977, and which became effective as of August 1, 1977.

2. The above described agreement is incorporated herein by reference the same as if fully set forth herein, and the signatures o the parties hereto shall have the same effect as if they were affixed to said above described agreement. In this connection, the Employer acknowledges receipt of a copy of said agreement.

3. The term of this Mcmorandum Agreement and its termination shall be governed by the provisions set out in the above described agreement.

4. This Memorandum agreement shall be binding upon the heirs, executors, successors and assigns of the parties.

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IN WITNESS WHEREOF, we have hereunto set out hands the day and year first above written.

The Master Agreement, incorporated therein, provides, inter alia: The Employers hereby recognize the Union as the sole and exclusive collective bargaining representative of all employees engaged infield fabrication and/or erection and/or contracted maintenance of structural, ornamental and reinforcing steel work coming within the jurisdiction of the International Association of Bridge, Structural, Reinforcing and Ornamental Iron Workers Union.

The Master Agreement further provides that such fabrication, erection and maintenance work shall include ". . .

safes, vaults, vault doors, safe deposit boxes . . ."

The Master Agreement also provides that covered employers contribute, on behalf of each unit employee, certain prescribed amounts to a Training Fund Program, a health and Welfare Fund, a Supplemental Benefit Plan, a vacation saving trust and a pension fund, and to make payments of certain prescribed fees to administer said funds. In accordance therewith, on April 22, Iglesias and Gallagher also signed contributing employers agreements specifically requiring Respondent to make payments on behalf of unit employees to the above described funds during the term of the Master Agreement, including any and all

amendments, supplements, modifications, extensions, renewals, or successor agreements thereto, and from year to year thereafter unless written notice revoking said Agreement is given to the respective Boards of Trustees.

Section 3 of the Master Agreement, herein referred to as the hiring provision or the referral provision, provides, inter alia, that "all employees required by the Employer shall be furnished and referred by the Union to the Employer off the hiring lists." In accordance therewith, from April 22 through May 16, Respondent requested, and the Union furnished to Respondent, workers from the Union's hiring hall lists. However, according to the uncontradicted testimony,

which I credit, of employee Juan De La Cruz and Union business agent and dispatcher Michael McKee, sometime in May, Respondent began obtaining employees from sources other than the Union to perform unit work. Since May 16, Respondent has not requested the Union to refer any workers to it. Similarly, Respondent has made no contributions to the various contractual fringe benefit funds except for the month of June. A report was made to the Funds for the month of May but no actual payment was ever made for May. Further, no contributions were made for the month of June for some of the employees identified by De La Cruz as working along with him performing unit work. De

La Cruz was the only employee listed on Respondent's June report.

Section 21 of the Agreement provides a grievance and arbitration procedure for the resolution of disputes regarding the application or interpretation of said agreement. On May 15, Steele sent a letter to Iglesias with a copy to the Arizona Steel Field Erectors Association, herein called the Association, the body of which reads:

> I had assumed that when you signed the agreement we would have continued a good relationship. On May 14, 1980, you informed our Agent McKee that you were going to sub-contract all of the bargaining unit work to M & J Installations. Please review

Section 20 of the Collective Bargaining Agreement. This Local Union has, as it is a contractural /sic/ prerogative, requested that the Labor Management Committee be convened to hear this grievance.

You will be hearing from Mr. Jim Kienitz of the Arizona Steel Field Erectors Association with respect to a time and date of the hearing.

The enclosure will clarify our grievance.

Respondent made no response to this letter.

Subsequently, a letter dated May 27 was sent to Iglesias by James F. Kienitz, representative for the Association, the body of which reads:

On May 19, 1980 this office received correspondence from Ironworkers Local #75 indicating their desire to pursue a grievance as filed by the Union alleging a violation of Section 20.

The mechanism for resolving disputes is found in Section 21 of the enclosed contract.

We have been unsuccessful in our attempt to contact you in an effort to schedule a hearing date.

Please be advised that, if we do not receive a response from you by June 13, 1980, we will notify the Union accordingly.

We are not aware of what contractural /sic/ action the Union

may be contemplating should the instant grievance go unresolved.

Thereafter, a letter, dated June 20 and signed by Robert L. Scott, Jr., representative for the Association, was sent to Iglesias, the body of which reads:

> Our past efforts to arrange with you a hearing date for the Arizona Labor-Management Committee to resolve a grievance filed by Iron Workers Local No. 75 have been unanswered.
>
> Please be advised that a hearing has been scheduled to commence at 4:00 p.m. Tuesday July 1st at the Arizona Employers' Council, Inc. located at 1820 North 7th Street Phoenix, Arizona.

At the hearing, you will be afforded the opportunity to rebut the allegations and present evidence and/or testimony. Should you fail to attend, a decision in support of the Union's position will more than likely be issued.

The hearing was held as scheduled on July 1 before the Arizona Labor-Management Committee, herein called the Committee. The Union asserted that Respondent had violated the hiring, wage, fringe benefits and grievance and arbitration provisions of the Master Agreement. Respondent made no appearance. Accordingly, the Committee concluded, as reflected by the Committee minutes:

DISCUSSION: It is apparent that reasonable efforts have been directed to having this matter heard before the established Labor-Management Committee in an effort to resolve the grievance. Based on the evidence presented and the facts discussed, and in the absence of no appearance nor rebuttal on the part of the Company, the LaborManagement Committee was forced to resolve the issue and render decision without contest.

DECISION: The Company has violated the provisions of the collective bargaining agreement relating to hiring, payment of wages, payment of benefits, and adjustment of

grievance and dispute. Since the Company has not complied with the provisions of the agreement and arbitration procedure to this point, and this Committee has decided that the Company is in fact in violation of several provisions of the collective bargaining agreement, the Union is free to seek whatever remedy through civil litigation or administrative agency.

A majority of the panel members approved this decision.

The Master Agreement was effective by its terms from August 1, 1977 through July 31, 1980. The Union gave timely reopener notice to the Association and by

letter dated May 30, gave the following notice to Respondent:

The Arizona Master Labor Agreement By and Between Arizona Steel Field Erector Association and the International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers Local Union 75, Phoenix, Arizona, to which you are bound has been opened with the appropriate signatory Associations to negotiate amendments, modifications, extensions and/or renewals to said Agreement. As has been the practice in the past, upon conclusion of these negotiations, we will send you a summary of the changes, amendments, modification, extensions and/or renewals to said Agreements.

If you are a member of any signatory Association to the Master Agreement, your association has already been notified of this reopener, and you will be bound by the negotiations between said Association and the Union. Therefore, please disregard this letter.

Subsequently, the Union and the Association entered into an agreement effective by its terms from August 1, 1980 to August 1982. There is no evidence that the Union and Respondent entered into a new agreement or even that any negotiations were had to that end.

B. Conclusions

General Counsel argues that by hiring employees obtained from sources other than the Union, by failing and refusing

to make contractually required payments to the respective benefit funds, by failing and refusing to participate in and abide by the contractual grievance and arbitration procedures, Respondent has repudiated its collective-bargaining agreement with the Union in violation of the Act.

Respondent argues that General Counsel has failed to show that Respondent employed any unit employees during the period that it is claimed that Respondent breached the hiring and fringe benefit contributions provision of the Master Agreement; and that the employees it hired from other sources and for whom it failed to make benefit payments were excluded from coverage under the Master

Agreement. I find no merit in this argument. Witnesses for the General Counsel credibly testified that in May and June Respondent had employees working with De La Cruz performing unit work, and that in July persons were observed performing unit work for Respondent who were not referred by the Union and for whom Respondent made no fringe benefit contributions.

Further, the record does not support Respondent's contention that these employees were excluded from coverage under the Master Agreement. Contrary to Respondent's contention, I find no evidence that would explain the jurisdiction and recognition provisions of the Master Agreement in the manner asserted by

Respondent. Although it is evident that Respondent did not perform all of the work listed in the Master Agreement as being within the Union's jurisdiction and it seems probable from Gallagher's testimony that Respondent did employ a person or persons to perform electronics work not listed as within the Union's jurisdiction, it is clear from Gallagher's testimony that when Iglesias agreed to sign the Memorandum Agreement there was no proposal or discussion as to any deviation from the Master Agreement nor was there any discussion which might serve to explain any ambiguity as to the scope of the unit described in the contract, or any reference to the November or December

discussions relative to the scope of the Unit.

General Counsel presented a strong prime facie case that employees hired through sources other than the Union were employed in the appropriate unit herein and that no fringe benefit payments were made on their behalf. Respondent presented no evidence to rebut this testimony. If such evidence did in fact exist, it was particularly within the knowledge of Iglesias, who was Respondent's president and supervisor of unit employees, and provable through Respondent's payroll and personnel records. However, Iglesias did not testify and was not present at the hearing herein. Respondent called only one witness, Ed Gallagher, the

former Union representative who had previously testified on behalf of General Counsel, and did not produce any documentary evidence in support of its position.

In these circumstances, I find it proper to infer, and I do, that if Iglesias had testified and if the appropriate records of Respondent had been introduced, such evidence would not have supported Respondent's position. In these circumstances, I find, as alleged in the complaint, that Respondent has unilaterally discontinued abiding by the hiring hall provisions of the contract; has unilaterally discontinued the contractually required payments to the fringe benefit trust funds and the contractually required payments of fees to

administer said funds; and has failed and refused to participate in the contractual grievance and arbitration procedure. I further find that these breaches of Respondent's contractual obligation are so substantial and pervasive as to evince a deliberate intent by Respondent to avoid its obligations under the collective-bargaining agreement with the Union. Accordingly, I find that Respondent by the above described unilateral conduct has violated Section 8(a)(1) and (5) of the Act. *V.M. Construction Co., Inc.*, 241 NLRB 584; *Farmingdale Iron Works, Inc.*, 249 NLRB 98.

Further, I reject Respondent's argument that it was free to ignore the terms and conditions of the

collective-bargaining agreement following the expiration of said agreement. It is well settled that certain contractual provisions such as grievance and arbitration procedure and fringe benefit payments survive the expiration of an agreement and cannot be modified unilaterally absent impasse. *American Sink Top and Cabinet Co., Inc.*, 242 NLRB 408; *Wayne's Olive Knoll Farms, Inc., d/b/a Wayne's Dairy*, 223 NLRB 260.

As to the referral provision, I conclude that it is analogous to arbitration provisions. It is a mandatory subject of bargaining generally of significant importance to employees in a covered industry, for by setting hiring priority standards, it directly affects their

opportunities for continued employment in the industry. *Houston Chapter, Associated General Contractors of America, Inc.*, 141 NLRB 409. In fact the parties herein have specifically recognized this significance, for the referral provision of the Master Agreement begins with the following recital:

> In order to maintain an efficient system of production in the industry to provide for an orderly procedure for the referral of applicants for employment, and to preserve the legitimate interests of employees in their employment, the Employers and the Union agree that when an individual Employer requires Iron Workers to perform any work covered by this Agreement, he shall hire applicants for employment to perform such work, in accordance with this Agreement.

Having expressed this concern and considering that an immediate cessation

of the use of the contractual referral procedure upon the expiration of the contract would do violence to the interests the procedure was designed to protect, it is difficult to infer that the parties intended for the referral procedure to expire with the contract. I therefore conclude that in the absence of some indication to the contrary, the parties did not intend that the hiring hall referral provisions of the contract expire automatically with the contract. See *Nolde Bros, Inc. v. Local No 358, Bakery & Confectionery Workers Union, AFL-CIO,* 430 U.S. 243 (1977); *American Sink Top & Cabinet Co., Inc., supra.* Accordingly, I find that Respondent's obligation to abide by the referral, grievance and

arbitration and fringe benefit provisions of the contract continued after the expiration thereof[2/] and that by its refusal to comply with said provisions, Respondent has unilaterally modified the terms and conditions of employment of its employees set forth in said contract in violation of Section 8(a)(1) and (5) of the Act.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2/ I reject Charging Party's argument that the contract did not expire since Respondent did not give notice to reopen the contract. I find that the Union gave such otice by its May 30 letter to Respondent.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By failing and refusing to abide by the fringe benefit, referral, and grievance and arbitration provisions of the 19771980 Arizona Master Labor Agreement between the Association and the Union, which Agreement is incorporated into the Memorandum Agreement between Respondent and the Union dated April 22, 1980, thereby unilaterally changing the terms and conditions of employment of its employees, Respondent has engaged in unfair labor practices violating Section 8(a)(5) and (1) of the Act.

4. All employees engaged in field fabrication and/or erection and/or

contracted maintenance of structural, ornamental and reinforcing steel work coming within the jurisdiction of the International Association of Bridge, Structural, Reinforcing and Ornamental Iron Workers Union, as set forth in the collective bargaining agreement between Respondent and the above-named Union, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that Respondent be

ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the purposes of the Act.

Having found that Respondent violated Section 8(a)(5) and (1) of the Act by its unlawful refusal to implement the terms and conditions of employment for unit employees contained in the referral fringe benefit and grievance and arbitration provisions of the 1977-1980 Arizona Master Labor Agreement between the Union and the Association, it is recommended that Respondent rescind all unilateral changes made in said terms and conditions of employment; give effect retroactively to the terms and conditions of employment for the unit employees as contained in

said provisions; make whole the employees and would-be employees in the unit found appropriate herein for losses suffered by reason of its failure to comply with said provisions, with interest; and make all contributions to the health and welfare, training, supplemental benefits, vacation savings and pension funds and make payments of the prescribed fees to administer said funds as provided in the 1977-1980 Arizona Master Labor Agreement and the various Contributing Employers Agreements signed by Respondent relative to said funds, which have not been paid and which would have been paid absent Respondent's unlawful discontinuance of such payments. Backpay plus interest for those incurring loss because of

Respondent's noncompliance with the referral provision of the 1977-1980 agreement shall be computed in the manner set forth in *F.W. Woolworth Company*, 90 NLRB 289, and *Florida Steel Corporation*, 231 NLRB 651.[3/]

Upon the foregoing findings of fact and conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[4/]

3/ See generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716.

4/ In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections

thereto shall be deemed waived for all purposes.

ORDER

Respondent, Southwest Security Equipment Corporation, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Refusing to abide by the terms of its collective bargaining agreement with International Association of Bridge,
Structural, Reinforcing and Ornamental Iron Workers Local Union No. 75, AFL-CIO.

(b) Refusing to bargain collectively with the abovenamed Union as the exclusive bargaining representative of the employees in the following appropriate unit:

All employees engaged in field fabrication and/or erection and/or contracted maintenance of structural, ornamental and reinforcing steel work coming within the jurisdiction of the International Association of Bridge, Structural, Reinforcing and Ornamental Iron Workers as set forth in the collective-bargaining agreement between Respondent and the above-named Union.

(c) Unilaterally changing any terms or conditions of employment of employees in the above unit during the life of any union contract without fist reaching agreement with the Union about such changes.

(d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights under the Act.

2. Take this affirmative action:

(a) Upon union request, recognize and bargain with the above-named Union concerning the employees in the above-described unit.

(b) Upon union request, rescind all unilateral changes made in the terms and conditions of employment of employees in the above-described unit contained in the referral, fringe benefit and grievance and arbitration provisions of the 1977-1980 Arizona Master Labor Agreement between said Union and the Arizona Steel Field Erectors Association incorporated in the April 22, 1980 Memorandum Agreement between Respondent and said Union.

(c) Upon union request, give effect retroactively to the referral, fringe benefits and grievance and arbitration provisions set forth in said Memorandum Agreement and Master Labor Agreement, and make whole its employees and would-be employees for losses suffered by reason of its failure to comply with those provisions, including the referral provisions, with interest.

(d) Upon union request, make all contributions to the health and welfare, training, supplemental benefits, vacation savings and pension funds, and pay the prescribed fees to administer said funds, as provided in the 1977-1980 Arizona Master Labor Agreement and the various Contributing Employers Agreements

signed by Respondent relative to said funds, which have not been paid and which would have been paid absent Respondent's unlawful discontinuance of such payments.

(e) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts owing under the terms of this Order.

(f) Post at its offices and jobsites copies of the attached notice marked "Appendix."[5/] Copies of said notice, on forms provided by the Regional Director for Region 28, after being duly signed by Respondent's authorized

representative, shall be posted by Respondent immediately upon receipt thereof, and shall be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director for Region 28, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

Dated: July 29, 1981

/s/ Earldean V.S. Robbins

Earldean V.S. Robbins
Administrative Law Judge

APPENDIX

Form NLRB-4727 NOTICE TO

(9-69)

EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

After a hearing in which all parties had an opportunity to present evidence, the National Labor Relations Board has found that we committed certain unfair labor practices and has ordered us to post this notice. We intend to abide by the following:

Section 7 of the National Labor Relations Act gives all employees the following rights:

To organize themselves

To form, join, or support unions

To bargain as a group through a representative they choose

To act together for collective bargaining or other mutual aid or protection

To refrain from any or all of these things.

WE WILL NOT refuse to abide by the terms of our collective-bargaining agreement with International Association of Bridge, Structural, Reinforcing and Ornamental Iron Workers Local Union No. 75, AFL-CIO. WE WILL NOT refuse to bargain collectively with the above-named Union as the exclusive bargaining representative of our

employees in the following appropriate unit:

> All employees engaged in field fabrication and/or erection and/or contracted maintenance of structural, ornamental and reinforcing steel work coming within the jurisdiction of the International Association of Bridge, Structural, Reinforcing and Ornamental Iron Workers Union as set forth in our collective-bargaining agreement with the above-named Union

WE WILL NOT unilaterally change any terms or conditions of employment or employees in the above unit during the life of any union contract without first reaching agreement with the Union about such changes.

WE WILL NOT in any like or elated manner interfere with, restrain, or coerce our

employees in the exercise of rights under the Act.

WE WILL, upon Union request, recognize and bargain with the above named Union concerning the employees in the above described unit.

WE WILL, upon Union request, rescind all unilateral changes made in the terms and conditions of employment of employees in the above described unit which are contained in the referral, fringe benefit and grievance and arbitration provisions of the 19771980 Arizona Master Labor Agreement between said Union and the Arizona Steel Field Erectors Association incorporated in our April 22, 1980 Memorandum Agreement with said Union.

WE WILL, upon Union request, give effect retroactively to the referral, finge benefits and grievance and arbitration provisions set forth in said Memorandum Agreement and Master Labor Agreement, and make whole our employees and would-be employees for losses suffered by reason of our failure to comply with those provisions, including the hiring hall provisions, with interest.

WE WILL, upon Union request, make all contributions to the health and welfare, training supplemental benefits, vacation savings and pension funds, and pay the prescribed fees to administer said funds, as provided in the 1977-1980 Arizona Master Labor Agreement and the various Contributing Employers Agreements

signed by us relating to said funds, which have not been paid and which would have been paid absent our unlawful discontinuance of such payments.

SOUTHWEST SECURITY EQUIPMENT CORPORATION

(Employer)

Dated_____ By_____

(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any

questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 3030 North Central Avenue, 2nd Floor, P.O. Box 33069, Phoenix, AZ 85067 [Telephone: (602) 241-2350]

APPENDIX "D"

Filed
October 12, 1984
Phillip B. Winberr y
Clerk, U.S. Court
of Appeals

Received
October 15, 1984
SNELL & WILMER

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD Petitiioner and INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, REINFORCING AND ORNAMENTAL IRON WORKERS, LOCAL UNION NO. 75, AFL-CIO, Intervenor, vs. SOUTHWEST SECURITY EQUIPMENT CORPORATION, Respondent.	)	No. 83-7286 O R D E R

On Petition for Enforcement of
an Order of the National
Labor Relations Board

Before: HUG, PREGERSON, and NORRIS, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected.

APPENDIX "E "

ARIZONA MASTER LABOR AGREEMENT

By and Between

SOUTHWEST SECURITY EQUIPMENT CORPORATION

and the

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, REINFORCING AND ORNAMENTAL IRONWORKERS LOCAL 75

PHOENIX, ARIZONA

THIS AGREEMENT, entered into this ____ day of _____, 1982, by and between SOUTHWEST SECURITY EQUIPMENT CORPORATION, hereinafter referred to as the "Employer" and the INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, REINFORCING AND ORNAMENTAL IRON WORKERS, LOCAL NO. 75, (affiliated with the AFL-CIO), party

of the second part, hereinafter referred to as the "Union":

WITNESSETH

PREAMBLE:

This Agreement is entered into by collective bargaining to prevent strikes and lockouts and to facilitate peaceful adjustment of grievances and disputes between Employer and Union in this trade and to prevent waste, unnecessary and avoidable delays and expense, and, so far as possible, to provide for labor's continuous employment, such employment to be in accordance with the conditions herein set forth and at wages herein agreed upon; also that stable conditions

SECTION 2. Recognition

(a) The Employer hereby recognize the Union as the sole and exclusive collective bargaining representative of all employees engaged in field fabrication and/or erection and/or contracted maintenance of structural, ornamental and reinforcing steel work coming within the jurisdiction of the International Association of Bridge, Structural, Reinforcing and Ornamental Iron Workers Union.

(b) It is further agreed, that in order for the Union to check all jobs, the purpose of enforcing the wage scale and working conditions, and upon request of the representatives of the Union before starting a job, or anytime thereafter, the Employer will immediately notify

the Union and inform them of the location, and if possible, provide the representative with the names of the men to be employed.

(c) A job conference will be held on request of the Union or the Employer.

SECTION 3. Referral Clause

In order to maintain an efficient system of production in the industry to provide for an orderly procedure for the referral of applicants for employment, and to preserve the legitimate interests of employees in their employment, the Employer and the Union agree that when an individual Employer performs any work covered by this Agreement, he shall hire Iron Worker applicants for employment to perform such work in accordance with this

Agreement. Nothing in this Section is intended to circumvent the jurisdictional dispute procedures referred to within this Agreement.

The parties to this Agreement will post in places where notices to employees and applicants for employment are customarily posted, all provisions relating to the function of the hiring arrangements, including the safeguards that we deem essential to the legality of an exclusive hiring agreement.

(a) All employees required by the Employer shall be furnished and referred by the union to the Employer off the hiring lists. Employers who have employed Iron Workers within the territory covered by this Agreement for the preceding

twelve (12) months shall have the right to call for any properly qualified Iron Worker off the "a" list.

The Employer shall have the right to reject any applicant or steward referred by the Local Union. Any such rejection shall only be for good reason or just cause. The term "good reason or just cause" shall apply to the following: excessive absenteeism, fighting on project, purposely destroying property, reporting to work in an unfit condition, gambling on project, drinking on project, theft, under the influence of a narcotic, unlawful acts, unsafe work practices or non-productive work practices.

Except under extraordinary conditions "not eligible for rehire" shall be

limited to ninety (90) days. In the event of a second offense, which results in another "not eligible for rehire", the ninety (90) day limit will not be applicable.

(b) The Union shall select and refer applicants for employment without discrimination against such applicants by reason of membership or non-membership in the Union and such selections and referral shall not be affected in any way by rules, regulations, by-laws, constitutional provisions or any other aspect or obligation of the union membership policies or requirements. The selection and referral of applicants shall be operated in accordance with the following plan.

(c) The Union and Employer agree to the employment of Apprentices. The Union shall select and refer Apprentices in accordance with the apprenticeship standards for the Bridge, Structural, Ornamental and Reinforcing Iron Worker's Industry for the State of Arizona.

(d) The Union shall register all applicants for employment on the basis of the Groups listed below. Each applicant shall be registered in the highest priority group for which qualified.

(e) Any applicant may register for employment in Phoenix, Tucson or Yuma providing however, that applicant will not be registered on more than one list at any time. In addition, Iron Workers who are referred to any Employer on a

given construction project within twenty-five (25) mile radius of Tucson or Yuma and choose to remain in that area after completion of construction work on that project or one year, whichever may be the latter of the two may be added to the local list of bonafide residents, if so desired. In any event an Iron Workers hall not be added to the Tucson or Yuma local bonafide resident list until said requirements have been met.

Those workers who reside in the Tucson or Yuma areas shall be paid mileage, subsistence and travel pay from the Tucson or Yuma City Hall.

GROUP "A"

All applicants for employment who have worked at the trade as a mechanic

for the past four (4) years in the geographic area covered by this Agreement having previously passed journeyman examination conducted by a duly constituted Local Union affiliated with the International Association of Bridge, Structural, Reinforcing and Ornamental Iron Workers qualifying them to work as a mechanic at the trade.

Prentices, having served their thirty-six (36) month period, in this jurisdiction, completed graduation and having passed a journeyman's examination conducted by a duly constituted Local Union affiliated with the International Association of Bridge, Structural, Reinforcing and Ornamental Iron Workers, qualifying

them to work as a mechanic at the trade shall be added to the "A" list.

GROUP "B"

All applicants for employment who have worked at the trade as a mechanic or apprentice for the past four (4) years; and have previously passed journeyman's examination conducted by a duly constituted Local Union affiliated with the International Association of Bridge, Structural, Reinforcing and Ornamental Iron Workers qualifying them to work as a mechanic at the trade.

GROUP "C"

All applicants for employment who have worked at the trade as a mechanic or apprentice for the past two (2) years or more within the geographical area

constituting the normal construction labor market.

GROUP "D"

All other applicants seeking employment not qualifying for the above groups.

(f) The Union shall maintain each of the separate Group lists as set forth above which shall list the applicants within each Group in the order of the dates they registered as available for employment.

(g) Employers shall advise the Union of the number of applicants needed. The Union shall refer applicants to the Employer by first referring applicants in Group "A" in the order of their places on said list and then referring applicants in the same manner successively from the

list in Group "B", Group "C" and Group "D". Any applicant who is rejected by the Employer shall be returned to the appropriate place within the Group and shall be referred to another Employer in accordance with the position of the Group and place within the Group. Upon a registrant being referred for employment, such registrant's name shall be removed from the list until such time as employment has been terminated at which time the registrant shall be registered at the bottom of the appropriate list under which the registrant is entitled.

(h) The order of referral set forth above shall be followed except in cases where Employers require and call for employees possessing special skills and

abilities in which case the Union shall refer the first applicant on the "A" list possessing such special skills and abilities.

(i) Upon demand the Employer shall furnish a surety bond of not less than $2,500. nor more than $25,000. These bonds are for the use and benefit of employees to who wages and/or other benefits are due under terms of this Agreement.

(j) In the event that the referral facilities maintained by the local union are unable to fill the requisition of an Employer for employees within a seventy-two (72) hour period after such requisition is made by the Employer (Saturdays, Sundays, and holidays excepted), the

Employer may employ applicants directly at the job site. In such event, the Employer will notify the Local Union of the names and dates of such hirings. Arrangements shall be made for the applicants to complete an application for referral.

(k) The Local Union, through its Examining Board, shall examine all job applicants who have not previously passed an examination conducted by a duly constituted Local Union affiliated with the International Association of Bridge, Structural, Reinforcing and Ornamental Iron Workers in order to determine whether they are qualified to perform the work of the craft as a mechanic and be eligible for referral.

(l) In the event that any job applicant is dissatisfied with the Group Classification or the order of referral in that such applicant claims to be not placed in the proper Group set forth above, or if the job applicant has failed an examination to qualify as an eligible referent, such aggrieved job applicant may appeal in writing within (1) ten days from the day on which the complaint arose, or failure to pass the examination, to an Appellate Tribunal consisting of an Employer Representative, a Union Representative and an impartial Umpire appointed by the Employer and the Union, and the decision of the Appellate Tribunal shall be final and binding.

(m) Dispatch Hours - except in cases of emergency, dispatching hours will be one and one-half hours after the established work starting time on all regular work days. Roll Call of applicants will be held each Tuesday morning immediately following dispatch hours.

AFFIRMATIVE ACTION PLAN

(n) Notwithstanding the stated order of preference in referrals as outlined in this section and notwithstanding any other provision in this Agreement, the dispatching office may give first priority preference to any classes protected by the Civil Rights Act, who are properly registered, where reasonably necessary to comply with "Affirmative Action Plans" which are conditions of

Federal or State assisted construction or which are established from time to time by the Union and Contractor, in concert with each other, as part of a Community Action or Industry Plan.

FEB - 6 1985

No. 84-1099

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

SOUTHWEST SECURITY EQUIPMENT CORPORATION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, REINFORCING AND ORNAMENTAL IRON WORKERS, LOCAL UNION NO. 75, AFL-CIO,
Intervenor.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITION FOR CERTIORARI and BRIEF AMICUS CURIAE

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February 6, 1985

No. 84-1099

IN THE

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OCTOBER TERM, 1984

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Petitioner,

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Intervenor.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The National Right to Work Legal Defense Foundation respectfully moves for leave to file the annexed brief as amicus curiae in support of the petitioner.

INTEREST OF AMICUS CURIAE

The National Right to Work Legal Defense Foundation is a non-profit charitable organization that exists to provide free legal assistance to individual employees

whose rights are being denied or who are suffering discrimination in employment as a result of compulsory unionism arrangements. It is the purpose of the Foundation to aid such individuals in protecting the rights guaranteed to them under federal and state law, inasmuch as they seldom are able, without assistance, to defend their rights against labor organizations which have abundant legal talent and resources at their disposal.

The National Right to Work Legal Defense Foundation has a vital interest in the present case, which addresses the unsettled question of whether an exclusive hiring hall arrangement, a device frequently used by labor organizations to impose compulsory unionism. survives the expiration of the collective bargaining agreement in which it is contained.

For the foregoing reasons, the National Right to Work Legal Defense Foundation requests that this Motion be granted and that the annexed brief be accepted for filing.

Respectfully submitted,

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TABLE OF CONTENTS

Page

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE i

INTEREST OF AMICUS CURIAE i

TABLE OF AUTHORITIES iv

BRIEF FOR THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER 1

INTEREST OF AMICUS CURIAE 1

ISSUE PRESENTED 1

ARGUMENT 2

CONCLUSION 5

TABLE OF AUTHORITIES

Cases *Page*

Branham v. Miller Electric Co., 237 S.C. 540, 118 S.E.2d 167 (1961) 4

Building Trades Council of Reno v. Bonito, 71 Nev. 84, 280 P.2d 295 (1955) 4

Kaiser v. Price-Fewell, Inc., 235 Ark. 295, 359 S.W.2d 449 (1962), *cert. denied*, 371 U.S. 955 (1963) 4, 5

Local 357, International Brotherhood of Teamsters v. NLRB, 365 U.S. 667 (1961) 3

Marine & Shipbuilding Workers v. NLRB, 320 F.2d 615 (3d Cir. 1963) 2

NLRB v. Cone Mills Corp. 373 F.2d 595 (4th Cir. 1967) 2

NLRB v. Haberman Construction Co., 618 F.2d 288 (5th Cir. 1980) 2

S. Freedman Electric, Inc., 256 N.L.R.B. 432 (1981) 2

Sun Oil Co. v. NLRB, 576 F.2d 553 (3d Cir. 1978) 2

TABLE OF AUTHORITIES continued

Miscellaneous *Page*

48 Am. Jur. 2d *Labor and Labor Relations* § 17 (1979) 4

II *The Developing Labor Law* (2d ed. 1983)..... 4

R. Gorman, *Basic Text on Labor Law* (1976) 4

T. Haggard, *Compulsory Unionism, the NLRB, and the Courts* (1977) 3, 4

8 T. Kheel, *Labor Law* (1984) 4

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On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

The interest of the amicus curiae is contained in the Motion for leave to file this brief and is adopted here.

ISSUE PRESENTED

The sole issue presented in this brief is whether an exclusive hiring hall provision in a collective bargaining agreement survives the expiration of that agreement.

ARGUMENT

It is well established that "union security" devices do not survive a collective bargaining agreement. The exclusive hiring hall is a "union security" device, and consequently does not survive.

It is a well-settled principle that "union security" devices do not survive the expiration of the collective bargaining agreement in which they are contained. *NLRB v. Haberman Construction Co.*, 618 F.2d 288, 302 (5th Cir. 1980); *Sun Oil Co. v. NLRB*, 576 F.2d 553, 558 (3d Cir. 1978); *NLRB v. Cone Mills Corp.*, 373 F.2d 595, 598 (4th Cir. 1967); *Marine & Shipbuilding Workers v. NLRB*, 320 F.2d 615, 619-20 (3d Cir. 1963); *S. Freedman Electric, Inc.*, 256 N.L.R.B. 432, 443 (1981). *Haberman*, supra, deals with the point succinctly:

> Contractual terms which are solely a product of the contract itself form an exception to the general rule that, at contract expiration, an employer is not free to deviate from contractual terms which are mandatory subjects of bargaining unless he has first bargained to impasse. Since the existence of these terms presupposes the existence of a contract, once that agreement has expired, an employer may alter these conditions without bargaining with the union . . . . Illustrations of terms of this type include . . . union security provisions . . . .
>
> 618 F.2d at 302 n. 16.

If, as demonstrated above, a "union security" device does not survive its collective bargaining agreement, it

would follow that an exclusive hiring hall provision would likewise expire with its contract if the exclusive hiring hall is a "union security" device. We contend that it clearly is. In *Local 357, International Brotherhood of Teamsters v. NLRB*, 365 U.S. 667 (1961), this Court observed:

> It may be that the very existence of the hiring hall encourages union membership. We may assume that it does.
>
> 365 U.S. at 675.

The point the Court was making was not that all hiring halls are operated in a discriminatory manner to the detriment of the non-union worker, but that a hiring hall, by its "very existence", functions as a "union security" device. The fact that a job-seeker's only avenue to employment is by referral through an exclusive union hiring hall requires that he present himself, smiling and cooperative, to the union agent. It is to belabor the obvious to argue that an anxious applicant, in such a situation, will take every available step to make himself acceptable to the referring entity. Under such circumstances, the pressure to join the union is more than subtle. As Professor Thomas R. Haggard states in his treatise, *Compulsory Unionism, the NLRB, and the Courts* (1977) at 112:

> A primary concern of the law has been that hiring halls not become a cover for de facto closed shop or other forms of otherwise illegal union security arrangements.

It is interesting to note that Professor Haggard devotes an entire chapter of the just-cited work to the issue before us, titling it, "Union Hiring Halls as a Form of Compulsory Unionism", *id.* at 97-113.

That the exclusive hiring hall is accepted without question as a form of "union security" in the legal community, and particularly among specialists in labor law, is demonstrated by the fact that authors and editors of scholarly works routinely classify the exclusive hiring hall as a subdivision of "union security". 48 Am. Jur. 2d *Labor and Labor Relations* § 17 (1979); II *The Developing Labor Law* 1396-1406 (2d ed. 1983); R. Gorman, *Basic Text on Labor Law* 664-70 (1976); T. Haggard, *Compulsory Unionism, the NLRB, and the Courts*, supra; 8 T. Kheel, *Labor Law* §§ 40.04[4], 42.03[1] (1984).

Twenty-one states have enacted Right-to-Work laws for the purpose of prohibiting "union security" devices within their borders. During the developmental period of case law on the hiring hall issue, the highest courts of three of those states, Arkansas, South Carolina, and Nevada, held the exclusive hiring hall to be violative of their Right-to-Work laws. *Kaiser v. Price-Fewell, Inc.*, 235 Ark. 295, 359 S.W.2d 449 (1962), *cert. denied*, 371 U.S. 955 (1963); *Branham v. Miller Electric Co.*, 237 S.C. 540, 118 S.E.2d 167 (1961); *Building Trades Council of Reno v. Bonito*, 71 Nev. 84, 280 P.2d 295 (1955). The rationale underlying those decisions was that the exclusive hiring hall was clearly a variety of "union security" —a potent device for inducing support of the union, if not outright membership. The *Kaiser* court spoke as

follows:

> The arrangement here in question therefore appears to be nothing more than an intricate web set up whereby the union can control employment. This control would be exclusive except for the employer's privilege of rejection. The employer would be subjected to work stoppage based upon breach of contract if he should permanently hire his brother without first referring him through the union hiring hall. No longer could public or private employment agencies or, for that matter, competing unions refer persons directly to an employer for employment.
>
> 359 S.W.2d at 453.

Thus, when one considers the comments of this Court, hiring hall decisions from Right-to-Work states, the views of legal scholars, and, not least important, a common sense awareness of what an exclusive hiring hall is and how it operates in the real world, the conclusion is inescapable that the hiring hall is a potent form of "union security". That fact, coupled with the principle that "union security" provisions expire with the collective bargaining agreements containing them, makes it clear that an exclusive hiring hall arrangement does not survive.

CONCLUSION

Contrary to the holding of the Ninth Circuit panel below, an exclusive hiring hall arrangement is a "union security" device which expires together with the collective bargaining agreement containing it. Untold numbers of

working people stand to suffer employment discrimination if the decision below is allowed to stand. The issue in question is one of major significance in the field of labor law, and a definitive ruling by this Court is needed to settle the matter. The Petition for Certiorari should be granted.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1984

SOUTHWEST SECURITY EQUIPMENT CORPORATION,
PETITIONER
v.
NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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13pp

QUESTION PRESENTED

Whether, in the circumstances of this case, the court of appeals properly held that petitioner violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing, upon expiration of the contract between petitioner and the Union, to honor the hiring hall referral arrangement provided for in the contract.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statute involved 1

Statement 2

Argument 6

Conclusion 8

TABLE OF AUTHORITIES

Cases:

American Sink Top & Cabinet Co., 242 N.L.R.B. 408 ..... 4, 5, 6, 7

Gordon L. Rayner, 251 N.L.R.B. 89 enforced, 665 F.2d 970 6

Hilton-Davis Chemical Co., 185 N.L.R.B. 241 7

Local 357, Int'l Brotherhood of Teamsters v. *NLRB*, 365 U.S. 667 7

NLRB v. *Houston Chapter, Associated General Contractors of America, Inc.*, 349 F.2d 449 cert. denied, 382 U.S. 1026 7

NLRB v. *Tom Joyce Floors, Inc.*, 353 F.2d 768 7

Sheeran v. *American Commercial Lines, Inc.*, 683 F.2d 970 7

Page

Statute:

National Labor Relations Act, 29 U.S.C. 151 *et seq.* 1

§ 8(a)(1), 29 U.S.C. 158(a)(1) 4, 5

§ 8(a)(3), 29 U.S.C. 158(a)(3) 7

§ 8(a)(5), 29 U.S.C. 158(a)(5) 4, 5

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-41a) is reported at 736 F.2d 1332. The decision and order of the National Labor Relations Board (Pet. App. 43a-109a), including the decision of the administrative law judge (Pet. App. 57a-109a), are reported at 262 N.L.R.B. 665.

JURISDICTION

The judgment of the court of appeals was entered on July 3, 1984. A petition for rehearing was denied on October 12, 1984 (Pet. App. 111a-112a). The petition for a writ of certiorari was filed on January 7, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth at Pet. 3-7.

STATEMENT

1. Petitioner sells, installs and services bank security equipment. In October 1979, the International Association of Bridge, Structural, Reinforcing and Ornamental Iron Workers, Local 75, AFL-CIO (the Union)[1] was certified as the exclusive bargaining representative for all installers working out of petitioner's Phoenix, Arizona facility (Pet. App. 5a-6a). In April 1980, petitioner signed the Union's master agreement with the Arizona Field Erectors Association, a multi-employer group (*id.* at 6a, 64a-65a). That agreement, which was effective from August 1, 1977, through July 1, 1980, required petitioner to hire employees for bargaining unit work through the Union's hiring hall and to make payments on their behalf to various union benefit funds (*id.* at 68a-70a). The hiring hall section of the master agreement provided (*id.* at 88a, 117a-118a; GCX 5, at 8)[2]:

> In order to maintain an efficient system of production in the industry[,] to provide for an orderly procedure for the referral of applicants for employment, and to preserve the legitimate interests of employees in their employment, the Employers and the Union agree that when an individual Employer requires Iron Workers to perform any work covered by this Agreement, he shall hire applicants for employment to perform such work, in accordance with this Agreement.
>
> * * * * *

---

[1]The Union intervened in the court of appeals and is a respondent in this Court.

[2]"GCX" refers to the exhibits of the General Counsel introduced at the hearing before the administrative law judge. "Tr." refers to the transcript of that hearing.

> (a) All employees required by the Employer shall be furnished and referred by the union to the Employer off the hiring lists.

Pursuant to the agreement's provisions, employees were placed on the hiring list and referred for work according to their qualifications, experience, including previous experience with employers covered by the master agreement, and according to the dates on which they registered with the hiring hall (Pet. App. 118a-127a; GCX 5, at 8-12). The agreement provided that applicants would be referred through the hiring hall without regard to their membership or nonmembership in the Union (Pet. App. 120a; GCX 5, at 9).

Between April 22 and May 16, 1980, petitioner requested, and the Union referred, eight employees from the hiring hall lists, including at least four employees who had been working for petitioner before the contract with the Union was signed. Petitioner filed a report for May 1980 with the benefit funds specified in the master agreement, but did not make any payments to the funds with respect to covered employees. Pet. App. 6a-7a, 70a-71a; Tr. 168; GCX 7a-7i, 8(a). Early in May, before the agreement's expiration, petitioner began obtaining employees from sources other than the hiring hall to perform work previously done by employees referred through the hiring hall, and after May 16, 1980 petitioner ceased requesting any referrals from the Union. All but one of the employees previously referred through the hiring hall were thereby laid off. Only one employee, who had been referred earlier and worked until June 26, 1980, was listed on petitioner's June report to the benefit fund trustees. Pet. App. 71a-72a; Tr. 18-20, 31-32, 52, 156, 161-168, 212, 252; GCX 8(b), 13, at 4-5. The Union

subsequently filed unfair labor practice charges with the Board.[3]

2. a. The administrative law judge (ALJ) concluded that petitioner violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1), by refusing to abide by the contractual provision governing hiring hall referrals during the term of the agreement and following its expiration in July 1980 (Pet. App. 57a-109a). Reasoning that the hiring hall provision constituted a term and condition of employment that survived expiration of the collective bargaining agreement, the ALJ determined that petitioner was not free to abrogate it absent a new agreement or bargaining impasse (*id.* at 86a-87a). The ALJ noted (*id.* at 87a-88a) that referral "is a mandatory subject of bargaining generally of significant importance to employees in a covered industry, for by setting hiring priority standards, it directly affects their opportunities for continued employment in the industry," and relied (*id.* at 86a-87a) by analogy on the Board's decision in *American Sink Top & Cabinet Co.*, 242 N.L.R.B. 408 (1979), in which the Board held that, in view of the parties' presumed intent, a contractual arbitration provision survived the contract's expiration where the dispute was over an obligation arguably created by the expired agreement.

---

[3]On May 15, 1980, the Union sent a letter to petitioner stating that it intended to file a grievance under the master agreement because petitioner had informed the Union that it would no longer seek employees referred through the hiring hall to perform bargaining unit work. Following petitioner's failure to respond to this letter, the employers' association issued a decision on the Union's grievance on July 2, 1980, finding that petitioner had violated the provisions of the master agreement "relating to hiring, payment of wages, payment of benefits, and adjustment of grievance and dispute," and stating that "the Union is free to seek whatever remedy through civil litigation or administrative agency." Pet. App. 72a-78a; GCX 14.

b. The Board adopted pro forma the conclusion of the ALJ that petitioner's refusal to abide by the hiring hall referral provision violated Section 8(a)(5) and (1) (Pet. App. 43a-45a). Because the Board determined that petitioner had not preserved for review its objection to the survival of the hiring hall provision following expiration of the contract, the Board adopted the ALJ's conclusion without addressing the merits of the ALJ's analysis (*id.* at 45a n.1).[4] The Board ordered petitioner to cease and desist from the unfair labor practices found, to bargain with the Union, to rescind all unilateral changes made in the terms and conditions of employment set by the referral, benefit, and grievance and arbitration provisions of the contract, and to give retroactive effect to those provisions. The Board's order also required petitioner to make whole all individuals who suffered losses by reason of its failure to comply with the hiring hall provisions and to make all contributions to the benefit funds that would have been made absent petitioner's unlawful discontinuance of those payments. *Id.* at 46a-55a.

3. The court of appeals enforced the Board's order (Pet. App. 2a-41a). Although a majority of the panel rejected the Board's conclusion that petitioner had failed to file timely exceptions to the ALJ's ruling with respect to the hiring hall provision (*id.* at 12a-20a),[5] the court held that the hiring hall

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[4]For the same reason, the Board adopted pro forma the ALJ's conclusion that petitioner violated Section 8(a)(5) and (1) by failing, following expiration of the contract, to abide by the provisions governing grievance and arbitration, as well as payments to the benefit funds. In adopting the ALJ's conclusion with respect to the survivability of the arbitration provision, however, two members of the Board expressly disclaimed reliance on *American Sink Top & Cabinet Co., supra.* Pet. App. 45a-46a n.1.

[5]Judge Norris dissented on this ground, concluding that petitioner's objections to the ALJ's decision did not meet the requirements of the Board's regulations (Pet. App. 34a-41a).

provision did survive the expiration of the contract (*id.* at 20a-29a). The court reasoned that "a hiring hall provision is an essential part of the employee/employer relationship" (*id.* at 25a), through which "construction employee[s] * * * find work * * * [and] establish seniority and entitlement to union benefits" (*id.* at 27a). Accordingly, the court concluded that the provision at issue here constituted a term and condition of employment that survived expiration of the contract and could not be abrogated by petitioner without negotiating a new agreement or bargaining to impasse (*id.* at 21a-23a, 29a).[6]

ARGUMENT

Petitioner does not contest that the court of appeals applied the correct principle in this case — that "those terms and conditions established by [a] contract and governing the employer-employee, as opposed to the employer-union, relationship survive the contract and present the employer with a continuing obligation to apply those terms and conditions" until the parties reach a new agreement or bargain to impasse. *Gordon L. Rayner*, 251 N.L.R.B. 89, 90 (1980), enforced as modified, 665 F.2d 970 (9th Cir. 1982); see Pet. 20, 22; Pet. App. 23a-25a. Rather, petitioner contends (Pet. 21-40) only that the court of appeals erred in its application of that principle to the facts of this case because the hiring hall provision regulated the relationship between petitioner and the Union rather than between petitioner and individual employees.[7]

---

[6]Noting that two members of the Board had disclaimed reliance on *American Sink Top & Cabinet Co., supra,* in adopting the ALJ's conclusion with respect to the survivability of the arbitration provision, the court "resolve[d] the case * * * without deciding whether an analogy to arbitration clause survivability is appropriate" (Pet. App. 33a).

[7]The court of appeals relied (Pet. App. 25a-28a) on the principle that hiring hall arrangements setting priorities for the referral and hiring of bargaining unit employees constitute mandatory subjects of bargaining

That contention does not merit review by this Court. As petitioner concedes (Pet. 16), the decision below does not conflict with any decision of this Court or any other court of appeals. Review would be especially inappropriate here because the Board, having determined that petitioner's objections were not timely raised, did not consider the issue on the merits.[8]

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because, by "establish[ing] a system of seniority rights and job priority," they "regulat[e] relations between the employers and employees in the industry involved, and * * * also settle a term or condition of employment." *NLRB* v. *Houston Chapter, Associated General Contractors of America, Inc.*, 349 F.2d 449, 452 (5th Cir. 1965), cert. denied, 382 U.S. 1026 (1966); accord *NLRB* v. *Tom Joyce Floors, Inc*, 353 F.2d 768, 771 (9th Cir. 1965); *Sheeran* v. *American Commercial Lines, Inc.*, 683 F.2d 970, 977 (6th Cir. 1982).

[8]Contrary to petitioner's assumption (Pet. 25-28), the Board has not yet definitively resolved the question whether an arbitration provision survives termination of a contract. Compare *Hilton-Davis Chemical Co.*, 185 N.L.R.B. 241, 242-243 (1970), with *American Sink Top & Cabinet Co.*, 242 N.L.R.B. at 408. The issue is presented in a case currently pending before the Board, *Indiana & Michigan Electric Co.*, No. 25-CA-10549 (argued Dec. 6, 1983). Petitioner's reliance (Pet. 25-28) on the nonsurvivability of union shop clauses is misplaced: unlike such clauses, the validity of a nondiscriminatory hiring hall arrangement is not dependent on an agreement in compliance with the proviso to Section 8(a)(3) of the Act, 29 U.S.C. 158(a)(3). See *Local 357, Int'l Bhd. of Teamsters* v. *NLRB*, 365 U.S. 667, 672-675 (1961); see also *NLRB* v. *Houston Chapter, Associated General Contractors of America, Inc.*, 349 F.2d at 452-453.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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